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No._____

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IN THE

Supreme Court of the United States

October Term, 1980

JOHN R. LARSON, Commissioner of Securities, Minnesota Department of Commerce; WARREN SPANNAUS, Minnesota Attorney General; Individually and in their official capacities,

Appellants,

vs.

PAMELA VALENTE, LARRY BARBER, LARRY HEFT, KIMBERLY KORMAN, and HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY,

Appellees.

ON APPEAL FROM,
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the court below erred in assuming that a statutory provision intentionally and impermissibly favored certain religious sects over others when there was no evidence of legislative intent supporting this conclusion and no evidence of favoritism resulting from the provision.

2. Whether a statute regulating charitable contributions which requires a religious organization to comply with registering and reporting requirements if it solicits more than half of its funds from the general public is an establishment of religion.

3. Whether the court below erred in expanding the "overbreadth doctrine" to an establishment clause challenge when there has not been a finding that appellees represent a religious organization.

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Appellees.

ON APPEAL FROM,
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JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States Court of Appeals for the Eighth Circuit dated January 7, 1981, holding a provision of the Minnesota Charitable Solicitations

Act,[1] to be violative of the establishment clause of the First Amendment to the United States Constitution. That provision exempts from certain registering and reporting requirements those religious organizations receiving over 50% of their contributions from their membership or affiliated organizations. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is reported at 637 F.2d 562 (8th Cir. 1981). The text of this opinion is set forth in Appendix A, *infra*. The order of the District Court for the District of Minnesota granting summary judgment is not reported. That order incorporates by reference portions of the unreported order of the district court granting plaintiffs' motion for preliminary injunction. The texts of these orders are set forth in Appendices B1, and C1 respectively.[2]

JURISDICTION

This action was initiated by plaintiffs-appellees (hereinafter "plaintiffs") in the United States District Court for the District of Minnesota pursuant to 42 U.S.C. § 1983 (1980) for injunctive and declaratory relief seeking to declare the Minnesota Charitable Solicitations Act, Minn. Stat. §§ 309.50-309.61 (1980) unconstitutional as violative of the First and

[1] Minn. Stat. §§ 309.50-309.61 (1980).

[2] The orders of the district court adopted the reports and recommendations of the federal magistrate to whom the preliminary injunction and summary judgment motions were originally referred. The reports and recommendations are set forth in Appendices B2 and C2 respectively.

Fourteenth Amendments and to grant an injunction against its enforcement.

Plaintiffs moved for summary judgment and defendants-appellants (hereinafter "defendants") cross moved for partial summary judgment. On August 31, 1979, the district court granted in part and denied in part plaintiffs' and defendants' motions. Defendants appealed and plaintiffs cross appealed. On January 7, 1981, the United States Court of Appeals for the Eighth Circuit issued an opinion holding a single provision of the Act unconstitutional and modifying and limiting the decision of the district court. A Notice of Appeal to this Court was filed on March 23, 1981, with the Eighth Circuit Court of Appeals. The jurisdiction of this Court to review the decision of the court of appeals is conferred by 28 U.S.C. § 1254(2).

STATUTE INVOLVED

The full text of the Minnesota Charitable Solicitations Act (Minn. Stat. §§ 309.50-309.61) is set forth in Appendix F.

STATEMENT OF THE CASE

1. The Proceedings Below

This action was commenced on October 11, 1978, by Complaint filed in the United States District Court for the District of Minnesota. Plaintiffs in the action as originally filed, were four individuals claiming to be members of the Holy Spirit Association for the Unification of World Christianity (hereinafter "Unification Church"), an alleged religious organization. Plaintiffs sought declaratory and injunctive relief against the officials of the State of Minnesota charged with enforcement of Minnesota's Charitable Solicitations Act, Minn. Stat. §§ 309.50-309.61 (1980) (hereinafter "Act"). Plaintiffs' action challenged the Act in its entirety as it applied to all religious and charitable organizations. In addition, the provision of the Act exempting religious organizations receiving more than half of their contributions from their membership or affiliated organization from the Act's registering and reporting requirements was challenged as being invalid with respect to religious organizations. See Minn. Stat. § 309.515(1)(b) (hereinafter "exemption provision").[3] After the filing of plaintiffs' action

[3] The exemption provision in total is as follows:

Subdivision 1. Subject to the provisions of subdivisions 2 and 3, sections 309.52 and 309.53 shall not apply to any of the following:

(b) A religious society or organization which received more than half of the contributions it received in the accounting year last ended (1) from persons who are members of the organization; or (2) from a parent organization or affiliated organization; or (3) from a combination of the sources listed in clauses (1) and (2). A religious society or organization which solicits from its religious affiliates who are qualified under this subdivision and who are represented in a body or convention is exempt from the requirements of sections 309.52 and 309.53. The term "member" shall not include those persons who are granted a membership upon making a contribution as a result of a solicitation.

but before the plaintiffs' motion for preliminary injunction was heard, the State of Minnesota instituted an action in State district court barring the Unification Church from soliciting contributions until such time as the annual financial statements required by the Act were filed.

Depositions were taken from the four individual plaintiffs for the purposes of determining jurisdictional issues and the real party in interest. No other discovery has been taken by plaintiffs or defendants. By stipulation it was agreed that the Unification Church would be joined as plaintiff in the federal court case and that the state court action would be stayed pending the outcome of the federal court litigation.

On July 5, 1979, the district court, following a recommendation from the magistrate to whom the matter was referred, granted plaintiffs' motion for a preliminary injunction barring the statute's enforcement as to plaintiffs and denied the defendants' motion to dismiss.

On January 19, 1980, the district court, again following the recommendation of the magistrate, rendered summary judgment for plaintiffs. The court held that the Act was unconstitutional as applied to religious organizations, and that the Act's cease and desist provisions (§ 309.534) and criminal penalty provision (§ 309.581) were unconstitutional as applied to persons "claiming to be religious organizations or members thereof." The court also determined that the Act was constitutional as applied to non-religious organizations and declared the Act's revocation and suspension provision (§ 309.532) to be non-justiciable. Defendants were permanently enjoined from enforcing the Act against any organization found to be religious and from enforcing the cease and desist and criminal penalty provisions of the Act against any organization "claiming to be religious."

Defendants appealed the order of the district court to the Eighth Circuit Court of Appeals on all issues resolved against them except for the finding with respect to the cease and desist provision. Plaintiffs cross-appealed the district court's determination that the Act was facially constitutional with respect to non-religious charitable organizations, but did not appeal the finding of non-justiciability of the revocation and suspension provision. The appeal was heard by a three-judge panel of the Eighth Circuit Court of Appeals which rendered its decision on January 7, 1981.

The Circuit Court affirmed the decision of the district court only insofar as the district court found that the exemption provision was violative of the establishment clause. The court, in its relief, rewrote the provision to exempt all religious organizations. In reaching this decision, the court held plaintiffs had standing under the "overbreadth" doctrine to bring the establishment clause challenge, and that the exemption provision violated the first and second prongs of the establishment clause test as enunciated by this Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).[4] The Circuit Court overturned that portion of the district court decision which found that the Act as a whole was unconstitutional as applied to religious organizations, and dismissed plaintiffs' appeal regarding the constitutionality of the Act as applied to non-religious organizations leaving that matter open for further development. Finally, the Court remanded the injunction issued against the State for modification and also remanded the question of whether plaintiffs' organization was religious and thereby entitled to exemption under the Act.

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[4] The Lemon test provides that a statute must: a) have a secular purpose; b) have a primary effect that neither advances nor inhibits religion; and c) not foster excessive government entanglement with religion.

2. The Statutory Scheme

The Minnesota Charitable Solicitations Act (Minn. Stat. §§ 309.50-309.61 (1980)) is a comprehensive statutory scheme regulating the solicitation of charitable contributions from the general public. The Act's purposes are to protect the contributing public from fraudulent and deceptive practices and to promote informed public contributing by allowing the public to become aware of the manner in which various organizations expend the contributed monies. Under the Act, a charitable organization, unless exempted, must register with the State prior to soliciting and comply with certain reporting requirements. Minn. Stat. §§ 309.52 and 309.53. The Act also includes certain investigation, enforcement and administrative provisions applicable to all religious and charitable organizations, whether or not exempted from the registration and reporting requirements.

The Act has been in effect since 1961, but has not yet been construed by the Minnesota Supreme Court. In 1978, a number of substantive amendments to the Act were enacted, including the addition of the cease and desist provision (§ 532.534) and the limitation on charitable expenditures provision (§ 309.555). The exemption provision was also amended in 1978. That provision, which had applied to all religious organizations, was amended to exempt only those religious organizations receiving more than 50% of their contributions from their membership or affiliated organization. Minn. Laws 1978 c. 601 § 5.

There are six categorical exemptions within the Act which excuse compliance with the registration and reporting requirements. These exemptions are inapplicable if the organization

employs a professional fund raiser, § 309.515(2) or has its exemption revoked under § 309.515(3).

These six categories of exemptions are as follows:

a. Organizations which received less than $10,000 annually and employ no paid staff;

b. Religious organizations which raise more than half of their public contributions from their membership or from affiliated religious organizations;

c. Organizations subject to the supervision of the Minnesota college system or to national accrediting organizations;

d. Fraternal benevolent associations which raise 100 percent of their funds from their membership;

e. Charitable organizations soliciting contributions for specified individuals and which pass through 100 percent of the contributions raised; and

f. Private foundations limiting solicitation to fewer than 100 members of the public.

The Act makes no distinction between religious and nonreligious organizations or among religious organizations other than in the exemption provision here adjudged unconstitutional. A religious organization may, however, be exempt under one of the other five categorical exemptions.

THE QUESTIONS ARE SUBSTANTIAL

This case marks the first time since *Gillette v. United States*, 401 U.S. 437 (1971) that the issue of the constitutionality of a statutory exemption applicable to some but not all religious organizations has been before this Court. This case is the first since *McGowan v. Maryland*, 366 U.S. 420 (1968), to place in issue whether a plaintiff, in a religion clause challenge, may assert the rights of others not before the Court. The Circuit Court below, ruling contrary to *Gillette*, held the challenged exemption to be unconstitutional and, contrary to *McGowan*, held plaintiffs had standing to maintain this action.

Specifically, the Circuit Court concluded below that the exemption provision violated both the secular purpose and primary effect prongs of the establishment clause test. The court reached this decision, however, without a factual or legislative record, relying instead on only its own speculations and unsupported assumptions. In so ruling, the court violated settled rules of procedure and constitutional presumption. More importantly, the court's assumptions were incorrect and misstated the actual purpose and effect of the challenged exemption. The court's decision is thus a particularly grievous and unjust federal court intrusion into state legislative action. Moreover, it is a direct challenge to the integrity and the motivation of the legislature of the State of Minnesota and leaves in doubt the ability of any state legislature to regulate effectively in the area of public solicitation by religious organizations. It should be reversed.

1. THE CIRCUIT COURT'S UNWARRANTED ASSUMPTIONS WITH RESPECT TO THE EXEMPTION PROVISION ARE ERRONEOUS, NOT SUPPORTED BY THE RECORD, AND PROCEDURALLY AND CONSTITUTIONALLY IMPROPER.

In concluding the exemption provision to be unconstitutional, the Circuit Court made numerous assumptions regarding the exemption provision. These assumptions fall into two general categories; assumptions regarding the legislative intent underlying the statute and assumptions regarding the factual effect of the statute. The Court, in creating these assumptions, however, reversed the general rules of presumption applicable to constitutional and summary judgment analysis and thereby committed error. The court's assumptions are also unjust. Had the assumed matters been investigated, documented or remanded by the court for further development, a result contrary to that of the court's would have been reached.

a. Assumptions Regarding Legislative Motivation

This Court has stated: "Inquiries into congressional motives or purposes are a hazardous matter." *United States v. O'Brien*, 391 U.S. 367, 383 (1968); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960).

Ignoring such cautionary words from this Court, however, the Circuit Court speculated as to legislative purpose in this case and incorrectly concluded that the exemption provision had been enacted by the Minnesota legislature pursuant to discriminatory motive, 637 F.2d at 566, 567 and 568. This holding was wholly unwarranted. Prior to the Circuit Court's ruling, legislative motivation and history had not been an issue in the

case. The district court had made no findings with respect to legislative purpose. No references to the legislative history were cited by either plaintiffs or defendants in their briefs to the Circuit Court and the Circuit Court's opinion cites no legislative history supporting its conclusions. The plaintiffs themselves did not even argue that the exemption provision violated the secular purpose prong of the establishment clause test and, in fact, expressly maintained that the court need not reach this issue. Brief of appellees/cross appellants p. 21-22 FN 11 (to Eighth Circuit).

Despite this total lack of foundation, the Circuit Court concluded that the exemption "smacks of 'religious gerrymandering', an apparently intentional favoritism for [the exempted] religious organizations." 637 F.2d 566. It also concluded, similarly based on no more than its own speculations, that "it seems much more likely that at some stage of the legislative process, special solicitude for particular religious organizations affected the choice of statutory language." 637 F.2d at 568. Indeed, the Circuit Court determined the exemption provision to be "constitutionally invidious" 637 F.2d at 568. Such perjorative findings regarding the efforts of the Minnesota Legislature extend far beyond the analysis this Court has taken even when unconstitutional motivation has been documented. *Palmer v. Thompson*, 403 U.S. 217 (1971); *United States v. O'Brien, supra.*

Inquiries into legislative purpose may be made under the secular purpose prong of the establishment clause test. However, a strong presumption of constitutional motivation remains even in establishment clause analysis. *See, e.g., Committee For Public Education v. Nyquist*, 413 U.S. 756, 773 (1973); *Lemon v. Kurtzman, supra*; *Gillette v. United States*, 401 U.S. 437 (1971). The cases which have found improper

secular purpose are not to the contrary, *Stone v. Graham*, —— U.S. ——, 101 S.Ct. 192 (1980); *Epperson v. Arkansas*, 393 U.S. 97 (1968). Both *Stone* and *Epperson* confined their analysis to whether a requirement that certain religious tenets be taught or exhibited in public schools constituted an establishment of religion.[5] Intentional discrimination among religious organizations was not found by this Court. The Circuit Court's decision, thus, steps well beyond the parameters of proper application of constitutional analysis. It turns the presumption of the legality of legislative motives on its head, *e.g. State of Minnesota v. Clover Leaf Creamery*, —— U.S. ——, 101 S.Ct. 715 n. 7 (1981).

The court's conclusions regarding legislative motivation are also unjust and incorrect. There is no support for the court's conclusions regarding legislative motivation in the legislative history.

Review of the Minnesota House and Senate committee and floor debates indicates the exemption provision received little attention.[6] The legislature was far more concerned with the cease and desist (§ 309.534) and the limitation on charitable expenditures (§ 309.555) provisions of the Act. Tape of Senate Judiciary Committee (March 18, 1978); tape of Senate Judiciary Sub-Committee (March 7, 1981); tapes of the House Commerce and Economic Development Committee (September 15, 1977, December 6, 1977 and January 19, 1978); and House Floor Session Tapes, March 11, 1978 and March 20, 1978.

The legislative history indicates only that the exemption provision was drafted primarily in response to the Maryland

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[5] Stone and Epperson reflect the heightened review applied under the establishment clause to laws affecting elementary and secondary education. Such review is inapplicable in the context of this case. Compare Lemon v. Kurtzman, *supra* with Tilton v. Richardson, 403 U.S. 672 (1971).

[6] Minnesota legislative history is recorded by voice tape.

Attorney General's Office investigation into the alleged deceptive fund-raising practices of a Catholic organization, the Pallotine Missions. Tape of House Commerce and Economic Development Committee (September 15, 1977). There was almost no discussion of the statute's effect on any organization even arguably "disfavored," to use the Circuit Court's language. In the Senate Judiciary Sub-Committee hearing on March 7, 1981, it was stated in a dialogue between two Senators that the amendment would allow the state to regulate those organizations soliciting in airports and in the streets. There is no other such discussion in the recorded Senate hearings. (A February 21, 1978, Senate Judiciary Committee hearing, the bill was apparently not recorded.) Less discussion occurred in the House. In one House committee meeting, a legislator did ask if the amendment would allow the regulation of airport soliciting. The answer provided was simply that if the organization in question solicited more than 50% of its funds from the public it would not be exempted. Tape of House Commerce and Economic Development Committee, January 19, 1978. The other references in the House Committee concerning the exemption provision referred solely to the Pallotine Missions.

No debate, discussions or comments concerning the exemption provision occurred on the House or Senate Floors. In short, this legislative history obviously falls far short of even a threshold showing of improper purpose. *United States v. O'Brien, supra.*

In fact, intentional discrimination under the Act is impossible. The manner and amount of money an organization solicits from the public is the decision of the organization alone. There are no dogmatic tenets involved here and therefore no lines of demarcation between favored and disfavored

sects. The conclusions of the Circuit Court are thus particularly inappropriate.

b. Assumptions Regarding Statutory Effect

The Circuit Court's decision was issued on appeal from a district court decision granting summary judgment for plaintiffs. Thus, under rules governing summary judgment, the court was required to construe factual matters in favor of the defendant. *Adickes v. S.H. Kress*, 398 U.S. 144 (1970). Indeed, in constitutional adjudication, constructions in favor of constitutionality are mandatory. *Ashwander v. TVA*, 297 U.S. 288, 346-348 (1936) (Brandeis, J. Concurring).

Nonetheless, the Circuit Court made a number of critical findings for plaintiffs in areas where there was no factual record supporting these conclusions. Here, again, the court reversed settled rules of constitutional and procedural presumption.

The lack of factual bases underlying the Circuit Court's conclusions is not denied by the court itself. As the court stated:

> We would be somewhat more comfortable with our conclusion if the record reflected, or judicial notice could ascertain, that there are in fact specific denominations in the category of churches receiving substantial public funding, amounting however to less than half their income.[7]

637 F.2d at 566.

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[7] The Court stated that its finding was made in absence of argument from the defendants herein. However, the defendants had not had a chance to develop the factual findings regarding this issue and should have been allowed to do so before the granting of summary judgment. The plaintiffs submitted no evidence supporting the court's conclusion, although it was their burden to do so. Adickes v. S.H. Kress, *supra*. See also, Gillette v. United States, 401 U.S. at 452 and discussion *infra* p. 22.

Other factual findings unsupported in the record and very much in dispute were also relied upon by the court in holding for the plaintiffs. Critically, the court assumed that the challenged legislation would benefit "well established churches" while disfavoring new churches. 637 F.2d at 566. There is, again, no factual basis in the record underlying this conclusion. For example, an ostensibly new and controversial organization such as the Church of Scientology is exempt from the reporting and disclosure provisions since it solicits primarily from its membership while "well-established" and non-controversial religious organizations such as the Billy Graham Crusade and the Salvation Army are not exempted. The sole criterion delineating coverage of the challenged statute is the extent of solicitation of funds from the general public. Whether or not an organization is "well-established" is not a dispositive factor.

In concluding that "well-established" sects benefitted under the Act while controversial sects were burdened, the Circuit Court apparently assumed that an exempted sect would be fully exempt from the registration and reporting provisions for all of its fund raising activities with which it was associated. This is not true. Even if a particular church is exempt under the statute an affiliated arm or organization of that church will not be exempt if it solicits over half its money from the general public. Thus, organizations affiliated with what the Court might have assumed to be "well-established" or "favored" sects such as Catholicism, Judaism and Protestantism may be required to register under the Act and indeed, prior to the injunction issued in this case, some had done so. These include, for example, the Little Sisters of the Poor (Catholic), the United Jewish Fund (Jewish) and Lutheran Social Services (Protestant). Thus, again, the court's assump-

tions regarding the effect of the exemption do not withstand scrutiny.

Finally, the Circuit Court's conclusion that the relative burdens placed upon non-exempt as opposed to exempt religious organizations are unconstitutionally onerous is equally non-meritorious. Plaintiffs proffered no evidence that the duties of the non-exempt religious organizations amount to any substantial burden. Financial records are normally kept by all organizations as a matter of course. Moreover, there was no indication that plaintiffs' religious activities were or could be burdened by the Act's requirements. These facts as well, were construed in favor of the plaintiffs and against the defendants.

2. THE EXEMPTION PROVISION IS VALID UNDER THE ESTABLISHMENT CLAUSE.

a. The Exemption Provision Is Based On Neutral And Secular Criteria And Furthers The Purposes Of The Act.

The Circuit Court rightly found that the Act as a whole had a valid secular purpose. 637 F.2d at 567. Yet the Circuit Court in reviewing the exemption provision, focused only on its alleged inequality of treatment and failed to review the provision as it relates to the Act's other provisions and theoretical basis. The Circuit Court's focus was thus too narrow and consequently exaggerates the effect of the exemption provision within the statutory framework. The exemption itself is limited; it applies only to the reporting and disclosure provisions of the Act. An exempted religious organization is subject to the other provisions of the Act; and even an otherwise ex-

empted religion must comply with the registration and reporting provisions if it employs a professional fund raiser. § 309.515(2).

Moreover, the exemption provision here challenged is not unique within the Act. There are a number of other provisions under which any organizations (including a religious organization) may be exempted from registration and reporting. See Minn. Stat. §§ 309.515 1(a), 1(c), 1(e) and 1(f).

All these exemptions are tied to the Act's purposes of providing protection and information to the public. The theoretical basis underlying the Act is the development of a system of accountability and public awareness of those organizations which solicit money from the general public. The majority of charitable organizations do not have beneficially interested stockholders who are in a position to monitor the disposition of the financial accounts of the institution, nor are there any purchasing consumers who by receiving tangible goods and services are in a position to evaluate the worth of those goods and services with respect to their consumer dollar. Rather charitable organizations work substantially without checks and balances. For this reason, it has long been held that it is in the public interest for the state to regulate the financial activities of these organizations and to promote the contributing public's awareness of their activities. *See e.g., National Foundation v. City of Fort Worth*, 415 F.2d 41 (5th Cir. 1969), *cert. denied* 396 U.S. 1040 (1970).

State regulation, as was recognized by the Circuit Court, is not as necessary when there are internal membership checks upon the organization, 637 F.2d at 565. Nor is regulation as needed when there is an external accountability imposed upon the organization by another source.

Thus, § 309.515(1)(c) exempts organizations subject to the supervision of the Minnesota college system or national accrediting organizations. This reflects legislative appreciation that either under State supervision or in the process of accreditation, these organizations are required to make periodic financial disclosures similar to those required under the Act and that these disclosures are already available to the public. Similarly, § 309.515(1)(d) exempts organizations soliciting solely from their membership. This is consonant with the determination that organizations soliciting only from their members are subject to internal accountability.

These concerns are reflected in the challenged exemption as well. A religion which relies on membership support necessarily has an ongoing and consistent contact with its membership which serves as a check on its financial practices. However, when an organization raises more than half of its monies from non-members, it becomes by definition more the financial creature of the public than of its internal membership. At this point, there is a greater public need in providing some sort of external check on its fund-raising activities. By such vehicles as registration statements and requirements of financial reporting the state can assure that the organization which has benefitted so heavily from the contributing public can be financially understood and appropriately evaluated by them. The 50% demarcation between exempt and non-exempt status thus becomes particularly important since it is at this point that the organization by its fund-raising activities has shown that it has elected to be more financially answerable to the public than its private membership. For this reason the 50% demarcation, far from being arbitrary as was suggested

by the Circuit Court, is perhaps the optimum point at which the state can best effectuate the purposes of the Act.[8]

The Circuit Court apparently felt that the legislature had only two choices; either to exempt or include *all* religious organizations within the statutory framework. Certainly, the Minnesota Legislature could have chosen an all or nothing scheme, but as has been shown, the 50% cut off is eminently reasonable. Critically, however in constitutional adjudication, where any cut off line to be drawn is peculiarly a legislative determination. It is not one for the courts. See *State of Minnesota v. Clover Leaf Creameries, supra*; *New Orleans v. Dukes*, 427 U.S. 297 (1976); *Williamson v. Lee Optical*, 348 U.S. 483 (1955). Since the cut off line here is neutrally and secularly based, it is thus proper under the establishment clause. *Gillette v. United States, supra.*

b. *Gillette v. United States* Confirms The Validity of The Exemption Provision Under The Establishment Clause.

Although the Circuit Court's opinion was primarily predicated on its erroneous speculation concerning legislative purpose, the other holding implicit in the opinion appears to be that any exemption cutting across religious lines will necessarily evidence improper purpose and result in an unconstitutional impact upon the non-exempted religious organization. This precise holding was rejected by this Court in the only case ever to reach this issue. *Gillette v. United States*, 401 U.S. 437 (1971). *Gillette* is controlling here.

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[8] The Circuit Court apparently took the position that the exemption was arbitrary because an exempted organization might receive more money from the public than does a non-exempt group. 566 F.2d at 637. The Circuit Court missed the point. The legislative determination was drawn to reflect concerns of accountability to membership, not to dollars received. Thus 50% is the proper standard to apply to further the accountability goal.

Plaintiffs in *Gillette* sought a determination that the Military Selective Service Act of 1967, 50 U.S.C. § 456(j) violated the establishment clause because it allowed exemptions from military service to persons whose religious beliefs included objection to all wars, but did not exempt those whose beliefs included objection to particular wars. Plaintiffs argued that this law operated as a de facto preference for some religious beliefs over others, precisely the point argued here and relied upon by the Court below.

This Court in *Gillette* held that disparate treatment alone was not a sufficient basis to render the law void on establishment clause grounds. As this Court noted:

> The critical weakness of petitioners' establishment claim arises from the fact that § 6(j), on its face, simply does not discriminate on the basis of *religious affiliation or religious belief*, apart, of course, from beliefs concerning war.

401 U.S. at 450 (emphasis added).

Similarly, in this case, the statute distinguishes only between percentages of funds raised from the public. This is not a discrimination of either religious affiliation or religious belief.

This Court also reached the argument present here that the exemption constituted a religious gerrymander. With respect to that point this Court stated:

> Of course, this contention of de facto religious discrimination, rendering § 6(j) fatally under inclusive, cannot simply be brushed aside. The question of governmental neutrality is not concluded by the observation that § 6(j) on its face makes no discrimination between religions, for the establishment clause forbids subtle departures from

> neutrality, "religious gerrymanders," as well as obvious abuses. Still a claimant alleging "gerrymander" must be able to show the absence of a neutral, secular basis for the lines government has drawn.

401 U.S. at 452 (citations omitted). This Court concluded that plaintiffs in that case had not met their burden.

Gillette thus establishes that the Circuit Court was incorrect in assuming a virtual *per se* rule against disparate treatment of religious organizations. Disparate treatment under *Gillette* is permissible if the challenged regulation has, as is present here, a neutral and secular basis.

Gillette also clearly shows that the burden of showing that an otherwise neutral provision constitutes a 'religious gerrymander' is on plaintiffs. Thus, the Circuit Court erred in not requiring the plaintiffs to meet their burden of establishing that the lines of demarcation drawn in the challenged statute did not have a neutral and secular basis.

In fact, the *Gillette* decision virtually mandates the conclusion that the challenged exemption in this case is constitutional. The criterion for exemption in *Gillette* was based on religious dogma grounds, an inviolate part of any religious institution. The same is not true of fund-raising. Although the Circuit Court contended that the challenged Act favors more traditional religious institutions, the State could not have constructed a religious gerrymander in this area even if it wanted to since fund raising practices are not inviolate, vary among religions with no discernible pattern, and even vary with respect to different organizations within one denomination. In such circumstances, a distinction among religious

organizations as is present here, incontrovertedly meets the *Gillette* test.[9]

3. THE CIRCUIT COURT IMPROPERLY APPLIED THE OVERBREADTH DOCTRINE.

Despite the fact that the application of the 'overbreadth' standing to religious clause challenges was disapproved by this Court in *McGowan v. Maryland*, 366 U.S. 420, 433 (1968), the Circuit Court nonetheless applied the doctrine in favor of plaintiffs' establishment clause challenge here. In so doing, the court's decision was without precedent.

In its decision, the Circuit Court relied on *Village of Schaumburg v. Citizens For a Better Environment*, 444 U.S. 620 (1980) which allowed an overbreadth challenge based upon speech grounds. *Schaumburg*, however, is no more than a continuation of the theory that overbreadth challenges are permitted in speech cases because of the interest involved in not chilling the speech rights of persons not before the Court. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). Parallel concerns are not present in religion cases, *McGowan v. Maryland*, 366 U.S. at 433. *Schaumburg* does not question the principle that overbreadth is "strong medicine" and is to be used only sparingly. Thus, *Schaumburg*, a speech case, cannot be said, without more, to have suddenly transferred the overbreadth doctrine to religious clause cases. *McGowan*, thus remains dispositive.

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[9] To say that there is a religious gerrymander present here is to say that laws which provide aid to sectarian institutions constitute a religious gerrymander between those organizations which have religious schools and those who do not. This has never been the holding of this Court. See Wolman v. Walter, 433 U.S. 229 (1977), Pierce v. Society of Sisters, 268 U.S. 510 (1925).

In *McGowan*, this Court held that certain businessmen were allowed standing to attack a Sunday closing law on establishment clause grounds since they had shown that they were economically affected by the Sunday closing law that was the subject of plaintiffs' lawsuit. The Court was clear that standing without this showing of adverse effect to the plaintiffs would be improper. 366 U.S. 429-433. The *McGowan* plaintiffs were thus not permitted to attack the challenged statute on free exercise grounds since they had not allowed their beliefs to be infringed. As this Court stated "[t]hose persons whose religious rights are allegedly impaired by the statutes are not without effective ways to assert these rights." 366 U.S. at 433.[10]

Here the plaintiffs have not established that they are disadvantaged by the challenged law, since as was noted by the Circuit Court, they have not established that the Unification Church is a religious organization. 637 F.2d 565, 570-571. Thus, in light of the Circuit Court's own conclusions regarding the status of the plaintiffs' organization, it is clear that standing without further showing should not have been allowed. *Citizens Concerned For The Separation of Church and State v. City and County of Denver*, 628 F.2d 1289 (10th Cir. 1980). To grant standing in such circumstance is to reject conclusions of this Court in the *McGowan* case.

At the very least, there is a split in the circuit regarding this point. The Tenth Circuit has recently held that plaintiffs must establish direct standing in order to bring an establishment clause challenge. *Citizens Concerned For The Separation of Church and State v. City and County of Denver, supra.* This

[10] Although the word "overbreadth" was not used in the McGowan opinion, a similar analysis was used in this Court's determination that the plaintiffs would not be allowed to represent the rights of others not before the Court. See Broadrick v. Oklahoma, 413 U.S. at 610, citing McGowan, 366 U.S. 429-430.

holding is directly opposed to the conclusions reached by the Eighth Circuit herein. The Tenth Circuit rule should be followed.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Dated: April 3, 1981

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 80-1131
No. 80-1159

Pamela Valente, Larry Barber, Larry Heft, Kimberly Korman, and Holy Spirit Association for the Unification of World Christianity,

Appellees/Cross-Appellants,

vs.

John R. Larson, Commissioner of Securities, Minnesota Department of Commerce; Warren Spannaus, Minnesota Attorney General; Individually and in Their Official Capacities,

Appellants/Cross-Appellees.

Appeal from the United States
District Court for the District of Minnesota

Submitted: October 13, 1980
Filed: January 7, 1981

Before ROSS, Circuit Judge, GIBSON, Senior Circuit Judge, and SACHS,* District Judge.

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* The Honorable Howard F. Sachs, United States District Judge for the Western District of Missouri, sitting by designation.

SACHS, District Judge.

This is an appeal from an order of the district court for the district of Minnesota[1] permanently enjoining the enforcement of the Minnesota Charitable Solicitations Act, Minn. Stat. §§ 309.50-309.61, "as to any and all religious organizations" and also permanently enjoining utilization of certain sections of the Act "against plaintiffs and other persons claiming to be religious organizations or members thereof." In the same order the district court declared the Act to be unconstitutional as applied to religious organizations and members thereof but constitutional as applied to non-religious organizations and members thereof. The court also ruled certain enforcement sections of the Act unconstitutional as applied to persons "claiming" to be religious organizations or members thereof.

Plaintiffs are the Holy Spirit Association for the Unification of World Christianity (Unification Church) and four persons asserting membership therein and claiming the right to solicit funds for the organization. Defendants are the two state officials charged with enforcement of the Act.

Notice of appeal was filed by the defendant attorney general and the defendant commissioner of securities, department of commerce. A cross-appeal was filed by plaintiffs, complaining of the ruling that the Act was valid as to non-religious organizations. Because plaintiffs were wholly successful in obtaining an injunction prohibiting enforcement of the Act against them, the cross-appeal will be considered only insofar as the issues decided may be pertinent to ruling on the appeal.

We are in general agreement with most of the basic conclusions of Judges Lord and Renner, and affirm those rulings.

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[1] The Honorable Miles W. Lord, United States District Judge. Judge Lord's order followed the recommendation of former magistrate, now United States District Judge, the Honorable Robert G. Renner.

We disagree, however, with some aspects of the disposition of the case, and remand for further proceedings.

All parties agree that the major legal issue in this case is whether the classification made in a religious exemption contained in the Act is invalid because of its unequal application to different religious organizations. We agree with the judges below that the classification is invalid and that the exemption should be expanded to cover all religious organizations.

Contained in the Act is an exemption from certain registration and disclosure requirements for

> [a] religious society or organization which received more than half of the contributions it received in the accounting year last ended (1) from persons who are members of the organization; or (2) from a parent organization or affiliated organization; or (3) from a combination of the sources listed in clauses (1) and (2). Minn. Stat. § 309.515(1)(b).

Subject to exceptions not material at this time,[2] religious organizations qualifying for the exemption need file neither a registration statement, § 309.52, nor an annual report-financial statement, § 309.53, with the securities division of the department of commerce. All other provisions of the Act apply irrespective of any exemption from registration and filing annual statements.

The court below initially granted plaintiffs' motion for a preliminary injunction and denied defendants' motion to dismiss. Plaintiffs then moved for summary judgment, seeking final ruling that the Act was unconstitutional. Plaintiffs assert that the Act is unconstitutional on its face and as applied

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[2] The religious exemption cannot be invoked if the organization employs a professional fund raiser, § 309.515(2), or has had its exempt status revoked by the department of commerce, § 309.515(3).

to the solicitation of funds by members of a religious or non-religious organization.[3] Defendants resisted the motion and filed a cross-motion for partial summary judgment, contending that certain of Plaintiffs' challenges were not justiciable.

We affirm the district court's ruling that the plaintiffs have standing to assert the facial invalidity of the Act, including the classification made in the religious organization exemption.

> Given a case or controversy, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court [citations omitted]. In these First Amendment contexts, the courts are inclined to disregard the normal rule against permitting one whose conduct may validly be prohibited to challenge the proscription as it applies to others because of the possibility that protected speech or associative activities may be inhibited by the overly broad reach of the statute. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634 (1980).

In *Schaumburg*, as in the case at bar, there was "an unresolved factual dispute concerning the true character of [plaintiff] organization." 1.c. 633. Thus, regardless of the ultimate determination of plaintiffs' status (religious or non-religious), the nature of the statute called into question by plaintiffs and

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[3] In the district court and on appeal there has been wide-ranging discussion of constitutional issues. This Court has entered an order limiting consideration of issues on appeal. Recognizing the gravity of constitutional adjudications, our decision is confined to the major substantive issue set forth above, and the matters expressly discussed in this opinion. While not prejudging any other issues, we note Judge Renner's comments that the Act has been in effect since 1961, that religious organizations were exempt prior to 1978, and that the legislation has operated without any other controversy requiring judicial interpretation or validation.

the nature of their challenge gives them standing to maintain suit.

We need not in this case decide whether it would be valid to divide religious organizations, like fraternal, patriotic, social, educational, alumni, professional, trade, or learned societies, § 309.515(1)(d), into two classifications: groups funded *solely* from internal sources and groups funded partly or wholly from public solicitations. Membership funding may have built-in safeguards and opportunities for informing contributors whereas solicitation from the public, lacking such safeguards, arguably needs greater public disclosure. The sticking point in this case is the unique classification dividing religious organizations between (1) groups relying primarily on internal funding but also possibly obtaining large amounts and percentages of income from public funding from (2) groups which look to the public for "more than half" of their funding.

We turn to the constitutional implications of this disparate treatment of religious sects. The First Amendment to the Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion . . ." Some forty years ago it was ruled that this clause applies to state legislative enactments as well as to federal action. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). In the landmark Establishment Clause decision it was thereafter stated:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . [The] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers . . . State power is no more to be used so as to handicap religions

than it is to favor them. *Everson v. Board of Education*, 330 U.S. 1, 15, 18 (1947).

It has been stated as a fundamental proposition that "[t]he government must be neutral when it comes to competition between sects." *Zorach v. Clauson*, 343 U.S. 306, 314 (1951).

The nondiscrimination principle, in the religious context, has been formulated by the second Justice Harlan as follows:

> In any particular case the critical question is whether the scope of the legislation encircles a class so broad that it can be fairly concluded that (all groups that) could be thought to fall within the natural perimeter (are included). *Welsh v. United States*, 398 U.S. 333, 357 (1970—concurring opinion), citing *Walz v. Tax Comm'n*, 397 U.S. 664, 696 (1970—separate opinion).

It is most difficult, if not impossible, in the present case to ascertain any basis for holding that the separate treatment of various religious organizations in the exemption provision of the Act follows any "natural perimeters" of public policy concerns. The need for public information would seemingly apply equally to religious organizations obtaining 40 and 60 percent of their funding from the public. It is not difficult to imagine a situation in which a religious organization which obtains 40 percent of its funding from the public obtains a substantially higher dollar amount from the public than does a religious organization which obtains 60 percent of its funding from the public. The special burdening of the latter group is in question.

The statutory discrimination between such organizations smacks of "religious gerrymandering,"[4] an apparently inten-

[4] The term is used in *Gillette v. United States*, 401 U.S. 437, 452 (1971) to describe a "subtle departure from neutrality" between sects. In the present case, the departure from neutrality may be less than "subtle" in nature—as will be shown, it has been quickly recognized by most judges who have viewed this type of legislation.

tional favoritism for the religious organizations obtaining some but less than half of their funds from the public. As further discussed, it may be inferred that the draftsmen of this legislation wished to reduce the burdens otherwise imposed on well-established churches which had achieved strong but not total financial support from their members; the draftsmen have exhibited less concern for easing regulations applicable to churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members. Actual discrimination exists if, as we assume, there are church organizations in both categories; intentional discrimination is a very real issue, in the absence of any explanation for the sizable loophole created for some religious organizations.

We would be somewhat more comfortable with our conclusion if the record reflected, or judicial notice could ascertain, that there are in fact specific denominations in the category of churches receiving substantial public funding, amounting however to less than half their income. All other judges who have viewed this issue (the federal judges in Minnesota and three tiers of state court judges in North Carolina, *Heritage Village Church and Missionary Fellowship, Inc. v. State of North Carolina*, 40 N.C.App. 429, 253 S.E.2d 473 (1979) and 299 N.C. 399, 263 S.E.2d 726 (1980)), have assumed or taken judicial notice that there are such churches. In the absence of argument to the contrary from the state officials here, we make the same assumption and conclude that real discrimination exists.

The inexplicable religious classification in the present case would seem dispositive, if the Court is bound to apply the

"ringing phrases" of *Everson*,[5] the *Zorach* insistence on neutrality, and the Harlan test of uniformity in classification. We look to further recent cases, however, for confirmation of our direction, because we recognize that the *Everson* and *Zorach* statements appeared in decisions which rejected Establishment Clause challenges.

The Supreme Court has developed a three-prong test which constitutes a "convenient, accurate distillation" of its "efforts over the past decades to evaluate a wide range of governmental action challenged as violative of the constitutional prohibition against laws 'respecting an establishment of religion,' and thus [has] provide[d] the proper framework of analysis for the issues presented in the case before us." *Meek v. Pittenger*, 421 U.S. 349, 358 (1975).

> First, the statute must have a secular legislative purpose. E.G., *Epperson v. Arkansas*, 393 U.S. 97. Second, it must have a "primary effect" that neither advances nor inhibits religion. E.g., *School District of Abington Township v. Schempp*, 374 U.S. 203. Third, the statute and its administration must avoid excessive government entanglement with religion. E.g., *Walz v. Tax Comm'n*, 397 U.S. 664.

Meek restates tests first announced in *Lemon v. Kurtzman*, 403 U.S. 602, 612-3 (1971). The *Lemon* tests have become general standards, frequently applied. *Stone v. Graham*, —— U.S. ——, 101 S.Ct. 192 (1980).

There can be little question that the Minnesota Act, viewed as a whole, has a valid secular purpose. The legislative intent underlying the measure appears from the face of the Act to be the prevention of fraudulent and deceptive conduct in the

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[5] Justice Blackmun's characterization, in his dissenting opinion as Circuit Judge in *In re Weitzman*, 426 F.2d 439, 448 (8th Cir. 1970).

solicitation of funds in the name of charity and the disclosure of facts which may be useful to the public, when evaluating such solicitations. *See Heritage Village Church and Missionary Fellowship, Inc. v. State of North Carolina*, supra, 263 S.E.2d at 731 (N.C. 1980). Such purpose is within the ambit of the state's police power.

The exemption provision of the Act, § 309.515, without considering the detailed classifications, also appears generally to serve the valid purpose of freeing from regulation certain organizations for which public disclosure of funding would not significantly enhance the availability of information to contributors. Among the groups exempted, as mentioned above, are those such as patriotic and fraternal societies which limit solicitation to voting members and certain charitable organizations which do not solicit in excess of $10,000 annually from the public. The safeguards attending membership funding have been mentioned; the small annual dollar amount collected by the exempted charitable organizations, in combination with the other requirements expressed in the provision, such as the use of volunteer solicitors, may be said to offset the legislatively perceived need for public disclosure at the state level. Educational institutions which are supervised by a state board or a national accrediting association are exempted; private foundations which solicit from fewer than 100 persons are exempted; and charitable organizations which solicit for a person named at the time of solicitation and which transfer all funds without restriction to that person are also exempted. A valid, secular legislative purpose may be discerned for each of these exemptions.

No such sound and justifiable purpose can be found in the system of classifying religious organizations. On the contrary, as previously suggested, the exemption of organizations which

conduct substantial public solicitations, if such solicitations account for less than half of the organization's income, appears to be designed to shield favored sects, while continuing to burden other sects. The classification has no ascertainable "secular legislative purpose" and does not survive the first portion of the *Lemon* test.

The defendants, relying on *Gillette v. United States*, 401 U.S. 437 (1971), urge that a generally valid secular purpose, such as the avoidance of unnecessary regulation, defeats an Etablishment Clause challenge to a statute, even though the burdens may fall more heavily on certain religious groups. Petitioners in *Gillette* claimed exemption from military service under § 6(j) of the Military Sective Service Act which exempted from service in the armed forces any person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." Petitioners challenged the section as violative of the Free Exercise and Establishment Clauses. Petitioners' contention was that "the special statutory status accorded conscientious objection to all war, but not objection to a particular war, works a de facto discrimination among religions." 1.c. 451-52. For example, it was argued that some religious faiths distinguish between "just" and "unjust" wars. 401 U.S. at 452, 470 (dissent). Thus it was said that some conscripts might be forced to serve in violation of religious scruples, whereas a member of another sect, having more generalized objections toward all wars, would be exempted from service. Having found that the statute on its face did not discriminate on the basis of religious affiliation, the Supreme Court considered whether there had been some subtle departure from governmental neutrality. In determining that there had been no such departure, the Supreme Court found that petitioners had failed to make the requisite showing of the

absence of a neutral, secular basis for the line drawn between objectors to all wars and objectors to a particular war. 1.c. 452. The Court sustained the legislative exemption, relying on the difficulty of devising a standard to cover a "virtually limitless variety of beliefs," petitioners' failure to articulate a feasible scheme of exemption, and the increased danger of government entanglement with religion and of erratic decisionmaking if a broadened exemption were devised. 1.c. 453-58.

Defendants' reliance on *Gillette* is clearly misplaced. The challenged statute in this case expressly separates two classes of religious organizations and makes the separation for no valid secular purpose that has been suggested by defendants. Inexplicable disparate treatment will not generally be attributed to accident; it seems much more likely that at some stage of the legislative process special solicitude for particular religious organizations affected the choice of statutory language. The resulting discrimination is constitutionally invidious.

If it be necessary to apply the second part of the *Lemon* test to the exemption provision of the Act, we conclude that a significant effect of the classification made within the religious exemption section could be to assist (by deregulation) certain religious groups, while burdening others. The benefit conferred on religious organizations that do not fall subject to the registration and disclosure requirements of the Act constitutes a substantial advantage; the burden of compliance with the Act is certainly not *de minimis*.

The registration section, § 309.52, requires, prior to any solicitation, that groups subject to the Act file with the state a detailed registration statement on forms provided by the

state.[6] Providing the items of information listed in the statute is not an insignificant undertaking, especially in view of the open-ended provision of subsection (p) for "[s]uch other information as the department may . . . require . . ." A

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[6] § 309.52 Registration requirement

Subdivision 1. No charitable organization, except as otherwise provided in section 309.515, shall solicit contributions from persons in this state by any means whatsoever unless, prior to any solicitation, there shall be on file with the department upon forms provided by the department, a registration statement containing, without limitation, the following information:

(a) Legally established name.

(b) Name or names under which it solicits contributions.

(c) Form of organization.

(d) Date and place of organization.

(e) Address of principal office in this state, or, if none, the name and address of the person having custody of books and records within this state.

(f) Names and addresses of officers, directors, trustees, and chief executive officer.

(g) Federal and state tax exempt status.

(h) Denial at any time by any governmental agency or court of the right to solicit contributions.

(i) Date on which accounting year of the charitable organization ends.

(j) General purposes for which organized.

(k) General purposes for which contributions to be solicited will be used.

(l) Methods by which solicitation will be made.

(m) Copies of contracts between charitable organization and professional fund raisers relating to financial compensation or profit to be derived by the professional fund raisers. Where any such contract is executed after filing of the registration statement, a copy thereof shall be filed within seven days of the date of execution.

(n) Board, group or individual having final discretion as to the distribution and use of contributions received.

(o) The amount of total contributions received during the accounting year last ended.

(p) Such other information as the department may by rule or order require to promote fairness of the solicitation and to assure full and fair disclosure of all material information to the department.

* * *

Subd. 2. The first registration statement filed by a charitable organization shall include a financial statement of its operation for its most recent 12 month period immediately preceding the filing of the first registration statement.

* * *.

group filing for the first time must provide, in addition to the registration statement, "a financial statement of its operation for its most recent 12 months." § 309.52(2).

The financial statement expected of first-time filers becomes an annual obligation under § 309.53, which mandates an annual report on state forms accompanied by a financial statement.[7] Such statements must contain the following: total receipts and income; costs of management, fund raising, and public education; and funds transferred out of the state and remaining within the state with a breakdown of disbursement

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[7] § 309.53 Annual report

Subdivision 1. Except as otherwise provided in subdivision 1a of this section, every charitable organization required to file a registration statement pursuant to section 309.52 shall file an annual report with the department of commerce upon forms provided by the department or on forms identical thereto on or before June 30 of each year if its books are kept on a calendar year basis. For cause shown the department may extend the time for filing the annual report for a period not to exceed three months.

Subd. 2. Such annual report shall include a financial statement covering the immediately preceding 12 months period of operation, and shall be executed by any two duly constituted officers of the charitable organization, who shall acknowledge that it was executed pursuant to resolution of the board of directors or trustees, or if there be no such board, then by its managing group which has approved the content of the annual report.

Subd. 3. The financial statement shall include a balance sheet, statement of income and expense, and statement of functional expenses, shall be consistent with forms furnished by the department, and shall be prepared in accordance with generally accepted accounting principles so as to make a full disclosure of the following, including necessary allocations between each item and the basis of such allocations:

(a) Total receipts and total income from all sources;

(b) Cost of management and general [sic];

(c) Cost of fund raising;

(d) Cost of public education;

(e) Funds or properties transferred out of state, with explanation as to recipient and purpose;

(f) Total net amount disbursed or dedicated within this state, broken down into total amounts disbursed or dedicated for each major purpose, charitable or otherwise;

(g) Names of professional fund raisers used during the accounting year and the financial compensation or profit resulting to each professional fund raiser. Unless otherwise required by this subdivision, the financial statement need not be certified. * * *.

or dedication. In the words of another court considering a substantially equivalent statute,

> However commendable as a sound business practice, such an audit does not spring full blown without considerable expense and administrative coordination.[8] *Heritage Village and Missionary Fellowship, Inc. v. State of North Carolina*, supra, 263 S.E.2d at 733 (N.C. 1980).

It is manifest that certain religious groups will suffer material burdens as a result of the obligations imposed by the Act and that certain other religious groups, not subject to the Act by virtue of the predominance of membership funding, will enjoy complete exemption from the demands of registration or disclosure. We must conclude that the Minnesota Statute prefers some religions over others. Such preference is in conflict with the amendment prohibiting establishment of religion by law, in the absence of compelling secular justifications like those sustained in *Gillette*.

In light of our conclusion that the classification made in Minn. Stat. § 309.515(1)(b) significantly burdens some religious groups and has no saving secular purpose, we need not examine the exemption for excessive government entanglement with religion, the third consideration in the Supreme Court's framework of Establishment clause analysis.

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[8] Defendants belittle the authority of the North Carolina litigation, pointing to the close division of judges on the North Carolina Supreme Court. We are impressed, however, that the trial judge (now Judge Ervin of the United States Court of Appeals for the Fourth Circuit) and the intermediate appellate court (in an opinion authored by a present United States District Judge) anticipated the majority ruling of the North Carolina Supreme Court. First Amendment jurisprudence is a responsibility of state court judges as well as federal judges. While our analysis differs somewhat from the rationale of the North Carolina courts, at least in form, we acknowledge that we are strengthened in our conclusion by the North Carolina resolution of issues which are essentially identical with those at bar.

Having approved of the district court's major holding, invalidating the religious classifications in the exemption section of the Act, we further conclude that the decision below is sound in its determination that all sects are entitled to claim the religious organization exemption, disregarding the invalid classification. It would be logically possible to strike the entire religious exemption as unconstitutional, rather than enlarge the exemption to cover all religious organizations. We believe the district court exercised good judgment, in accordance with probable legislative intent, in selecting the least disruptive method of editing the Act to eliminate an unconstitutional provision.

Under the rule of severability (Minn. Stat. § 309.61) the surviving provision in the exemption section will comprehensively apply to "a religious society or organization." We recognize that the resulting legislative scheme could be questioned as favoring all religious organizations over others. In light of the traditional governmental reluctance to intrude unnecessarily in the affairs of religious organizations, and the absence of parties ready to litigate the issue posed, we do not question the broadened exemption provision.

Contrary to an assumption made below in dealing with the intricacies of this rather complex statute, the exemption does not apply to the entire Act. Portions of the Act still literally apply to religious organizations.[9] The injunction is thus overly broad. In the absence of full consideration and final rulings below, we do not discuss possible constitutional issues regarding the remaining sections, as applied to all religious organizations. A cautious approach to such issues is mandated by

[9] For example, deceptive names and practices are forbidden, the sale of contributor lists is forbidden, and solicitors must supply tax deductibility information to contributors. Minn. Stat. §§ 309.-55(1)(5)(6), 309.556(b).

NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979). *Note however, Christian Echoes National Ministry, Inc.* v. *United States*, 470 F.2d 849 (10th Cir. 1972), cert. denied. 414 U.S. 864 (1973); *Securities and Exchange Commission v. World Radio Mission, Inc.*, 544 F.2d 535 (1st Cir. 1976); *In re Rabbinical Seminary*, 450 F. Supp. 1078 (E.D.N.Y. 1978), for applicability of disclosure requirements to the financial and political activities of religious organizations.

The validity of the regulation of all charitable solicitation as such need not be closely considered at this time to determine if the dicta favorable to such regulation in *Village of Schaumburg*, supra at 637-8, is sound and controlling here. The views of the district court on this subject were expressed without benefit of the *Schaumburg* decision. In any event, on remand, the parties will have an opportunity to focus their contentions on these and other provisions of the Act which have received only marginal attention, and will have the guidance of *Schaumburg* in making such examination.

The ruling that plaintiffs and others "claiming" to be religious organizations should enjoy the religious exemption and should be free from all regulation under the Act does not appear to be justified, and that much of the injunctive order is also disapproved. A "bare assertion . . . without the production of any evidence . . . is simply not sufficient to sustain [an] assertion that [the Unification Church] is a religious organization." *United States v. Berg*, No. 80-1432 (8th Cir., December 8, 1980). Plaintiffs' claims should not be accepted without inquiry. The parties should have an opportunity to develop the record and obtain rulings below. It may be observed, however, that a considerable burden is on the state, in questioning a claim of a religious nature. Strict or narrow construction of a statutory exemption for religious organiza-

tions is not favored. *Washington Ethical Society v. District of Columbia*, 249 F.2d 127, 129 (D.C. Cir. 1957, Burger, J.). Judicial determination of religious sincerity and status is a most sensitive undertaking, but is not without precedent. *Gillette*, supra at 457, (whether a belief is "truly held" is open to question, the "truth of a belief" is not); *Wisconsin v. Yoder*, 406 U.S. 205, 219-29 and 235 (1972) (sincerity of religious belief demonstrated by conduct); *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1162 (D.C.Cir. 1969), cert. den., 396 U.S. 963 (1969) (declining to hold summarily that plaintiff is a religion; claim of religious status is subject to contradiction by showing of insincerity of beliefs). Cf. *Walker v. Wegner*, 477 F. Supp. 648, 652 (D.S.D. 1979) (preliminary injunction granted against a statutory scheme involving *administrative* determination of "whether a particular cause is religious"), affirmed on other grounds, 624 F.2d 60 (8th Cir. 1980).

In summary, we agree with the district court's holding that plaintiffs have standing to challenge the classification made in the exemption section of the Act, as it pertains to religious organizations; we agree with the court's invalidation of the classification made in that section; we agree that the exemption section should apply to all religious organizations, subject to possible legislative revision; we disagree with the conclusion that no part of the Act may be applied to religious organizations, but leave open questions of construction and validity for further development, including the application of the Act to charitable organizations; and we disagree with the conclusion that plaintiffs and others claiming the religious exemption should automatically enjoy such exemption, but leave open the question of plaintiffs' status for further development.

The judgment below is vacated and the cause remanded for entry of a modified injunction and further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B1

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil 4-78-453

PAMELA VALENTE, et al.,

Plaintiffs,

vs.

JOHN R. LARSON, et al.,

Defendants.

ORDER

Based upon the November 15, 1979, Report and Recommendation of the Honorable Robert G. Renner, United States Magistrate,

IT IS HEREBY ORDERED that plaintiffs' motion for summary judgment is granted in part and denied in part, and defendants' motion for partial summary judgment is granted in part and denied in part, as follows:

1. The Minnesota Charitable Solicitations Act, Minn. Stat. §309.50 *et seq.*, is unconstitutional as applied to religious organizations and members thereof;

2. The Act is constitutional as applied to non-religious organizations and members thereof;

3. Sections 309.534, subd. 1(a), and 309.581 of the Act is unconstitutional as applied to persons claiming to be religious organizations or members thereof;

4. The constitutionality of the application of section 309.-532 to plaintiffs and others whose claims to a religious exemption are challenged by the State is a nonjusticiable issue;

5. The Commissioner of Securities is permanently enjoined from enforcing the Act as to any and all religious organizations;

6. The Commissioner of Securities is permanently enjoined from utilizing sections 309.534, subd. 1(a), and 309.581 to enforce the Act as against plaintiffs and other persons claiming to be religious organizations or members thereof.

Dated: January 19, 1980.

MILES W. LORD
U. S. District Judge

APPENDIX B2

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil 4-78-453

Pamela Valente, Larry Barber, Larry Haft and Kimberly Korman, and the Holy Spirit Association for the Unification of World Christianity,

Plaintiffs,

vs.

John R. Larson, Commissioner of Securities, Minnesota Department of Commerce; Warren Spannaus, Minnesota Attorney General; individually and in their official capacities,

Defendants.

REPORT AND RECOMMENDATION

The above-captioned case came on for hearing before the undersigned United States magistrate on August 31, 1979 pursuant to the plaintiffs' motion for summary judgment and the defendants' motion for partial summary judgment and by Order of the Honorable Miles W. Lord, United States District Judge, designating the undersigned to hear and make recommendation for the disposition of the same in accordance with 28 U.S.C. §636(b)(1)(B).

Barry A. Fisher appeared on behalf of the plaintiffs. Minnesota Special Assistant Attorneys General William P. Marshall, Karen G. Schanfield and D. Douglas Blanke appeared

on behalf of the defendants. The court, having considered the briefs and arguments of counsel as well as the entire record herein, hereby makes the following Report and Recommendation.

I. BACKGROUND OF THE CASE

By this action, plaintiffs seek to have the Minnesota Charitable Solicitations Act, Minn. Stat. §309.50 *et seq.* (1978) (hereinafter, the "Act") declared unconstitutional on its face and as applied to them. They also seek a permanent injunction barring its enforcement.

On July 5, 1979 the district court entered an Order granting plaintiffs' motion for a preliminary injunction barring the statute's enforcement as to them and denying the defendants' motion to dismiss. That Order was based upon a *de novo* review of the May 3, 1979 Report and Recommendation (hereinafter, "Report") of the undersigned.

By their present motion, the plaintiffs seek summary judgment declaring the Act unconstitutional on its face and permanently enjoining its enforcement against them. By their motion for partial summary judgment, the defendants seek an order declaring that section 309.532, the revocation provision, and section 309.534, the cease and desist provision, are not properly justiciable.

The factual circumstances surrounding the case have not changed substantially since this court issued its May 3 Report. Except to the extent that they are herein modified, the factual premises set forth the Report are incorporated by reference into this Report and Recommendation.

II. STANDING TO BRING MOTION FOR SUMMARY JUDGMENT

The issue which plaintiffs' summary judgment motion presents is whether or not the Minnesota Charitable Solicita-

tions Act is constitutional as it applies to solicitation by religious organizations or groups claiming to be religious organizations. Plaintiffs ask the court to assume, and even conclude, as part of their motion, that they are members of a religious organization, that the plaintiff Holy Spirit Association for the Unification of World Christianity (hereinafter, "Unification Church") is a religious organization, and that the activity in which it and the individual plaintiff members are engaged is solicitation for religious purposes.

The defendants contend that the plaintiffs do not have standing to challenge the regulatory scheme embodied by the Act based upon their allegation, supported only by disputed evidence, that the Unification Church is a religion and that its fund raising activity is a religious practice. They contend that only when the court has reached a determination of these factual issues may the constitutional issues be reached.

Plaintiffs counter that, even if the court cannot conclude that the plaintiffs are a religious organization and members thereof, the overbreadth doctrine allows them to challenge the statute without having to make a conclusive showing regarding their religious activities prior to such an adjudication.

While it is true that application of the overbreadth doctrine may be "strong medicine", *Broadrick vs. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908 (1973); the doctrine has been applied in cases where statutes have sought to regulate only spoken words, *Gooding vs. Wilson*, 405 U.S. 518, 520, 92 S.Ct. 1103 (1972); where statutes have ensnared rights of association, *Keyishian vs. Board of Regents*, 385 U.S. 589, 605-610, 87 S.Ct. 675 (1967); where statutes have purported to regulate the time, place and manner of expressive or communicative conduct, *Grayned vs. City of Rockford*, 408 U.S. 104, 114-121, 92 S.Ct. 2294 (1972); or where statutes required the official

approval of First Amendment activity by local functionaries under laws that delegated standardless discretionary powers, thus resulting in prior restraints without sufficient due process protection, *Shuttlesworth vs. Birmingham*, 394 U.S. 147, 150-153, 89 S.Ct. 935 (1969); *Freedman vs. Maryland*, 380 U.S. 51, 56, 85 S.Ct. 734 (1965). See, generally, *Broadrick vs. Oklahoma, supra*, 413 U.S. at 612-613.

It is clear that the issue of whether a statute or ordinance is void on its face because it impinges upon constitutionally protected activities is a legal, not a factual, question and therefore one which is appropriate for summary judgment. *Holy Spirit Association for the Unification of World Christianity vs. Alley*, 460 F.Supp. 346, 347 (N.D.Tex. 1978). *See also, ISKCON, Inc. vs. Lentini*, 461 F.Supp. 49 (E.D.La 1978); *Swearson vs. Meyers*, No. 78-2034 (D.Kan. 1978) (granting summary judgment based upon an earlier decision on a preliminary injunction motion in *Swearson vs. Meyers*, 455 F. Supp. 88 (D.Kan. 1978)).

In the instant case, the plaintiffs have submitted substantial, although not uncontroverted, evidence of the religious nature of the Unification Church and of their solicitations. They have challenged a statute regulating their rights to freedom of speech, religion and association, not only on substantive grounds but also on grounds that its vagueness and authorization of prior restraints violates their due process rights. These rights are not insubstantial, and neither is the legitimacy of plaintiffs' challenge to the constitutionality of the statute.

Plainly, factual disputes exist as to whether or not the individual plaintiffs are members of a religion and whether or not their activities are religious or commercial, just as the defendants contend. However, in light of the circumstances

of this case, the court must conclude that these issues, although they may ultimately need to be resolved in order to determine whether or not plaintiffs must register, are not material to a legal interpretation of the statute itself. The questions raised by the plaintiffs' motion for summary judgment attacking the Act's constitutionality are viable.

III. ESTABLISHMENT CLAUSE VIOLATIONS

Plaintiffs allege that the exemptions contained in section 309.515 facially discriminate against their religion in violation of the Establishment Clause of the First Amendment. Section 309.515(b) exempts from registration

> "A religious society or organization which received more than half of the contributions it received in the accounting year last ended (1) from persons who are members of the organization; or (2) from a parent organization or affiliated organization; or from a combination of the sources listed in clauses (1) and (2) . . ."

For reasons set forth in the May 3 Report, pp. 18-19, the court now holds that the above provision violates the second of the requirements set forth by the Supreme Court in *Lemon vs. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105 (1968), in that it inhibits religious organizations which receive more than half of their contributions from non-members, and thereby enhances religious organizations which receive less than half from non-members. The statute's failure to treat all religious organizations equally renders the entire Act unconstitutional as it applies to religious organizations.

This holding is by itself sufficient to grant partial summary judgment to plaintiffs on the constitutionality of the Act as applied to religious organizations. It is, therefore, unnecessary for the court to further consider the substantive provisions of the Act as they apply to religious organizations.

The court, however, finds that the substantive provisions of the Act are not offensive to the constitution in their application to non-religious organizations, for their solicitation rights do not give rise to the high degree of First Amendment protection afforded solicitations by those of a religious nature. As to them, the Act is a legitimate exercise of the state's police power to regulate speech of a commercial nature. *Ohralik vs. Ohio State Bar Association*, 436 U.S. 447, 455-6, 98 S.Ct. 1912, 1918-9 (1978).

IV. DUE PROCESS CLAIMS

For the plaintiffs, however, the ultimate question of whether the Unification Church is a religious organization and thus forever protected by this decision from regulation under the Act must still be determined. This determination may well have to be made in the future as respects other organizations claiming a religious exemption.

Plaintiffs argue that the procedural framework for making that decision allows imposition of a prior restraint without adequate constitutional safeguards. The defendants claim that the constitutionality of the statute's enforcement provisions is not justiciable because they do not come into play unless a person has already registered, which these plaintiffs have not done.

A. *Justiciability*

The registration revocation and suspension provisions of the Act, contained in section 309.532, subds. 1, 3, 4 and 5, authorize the state Department of Commerce to suspend or revoke a registration and thus to prevent an organization from lawfully soliciting, if the organization: (1) has filed an incomplete, false or misleading registration, (2) has engaged in a fraudulent, deceptive or dishonest practice, (3) is en-

joined from continuing a solicitation practice or (4) has violated the Act.

The cease and desist provisions of section 309.534, subd. 1(a) authorize the Commissioner of Securities of the Department of Commerce to issue orders compelling a person to stop violating the Act.

Since it is a violation of the Act for a non-exempt individual or organization to solicit without first registering with the Department of Commerce, an unregistered party claiming to be a religious organization could be served with an administrator's *ex parte* cease and desist order requiring the party to cease any solicitations. Thus, the fact that the plaintiffs are not registered under the Act does not deprive the state from taking action against them under the cease and desist section. Consequently, this court finds the constitutionality of that provision of the Act to be a justiciable issue.

As to the suspension and revocation provision, however, the defendants' contention appears to be meritorious. The court has already found the Act to be unconstitutional and therefore inapplicable to religious organizations. Thus, the only question remaining concerns the process due a person or organization claiming a religious exemption from the registration provision. Since such a party would not have registered under the Act in the first place, the issue of revocation or suspension of registration would never arise. Thus, no justiciable controversy remains as to the constitutionality of section 309.532.

B. *Due Process Violations*

As this court has previously held, solicitation in connection with the dissemination of information and espousal of religious beliefs is, without a doubt, an activity protected by the First Amendment. *Murdock vs. Pennsylvania*, 319 U.S. 105, 109-11, 63 S.Ct. 870, 873-4 (1943); *Cantwell vs. Con-*

necticut, 310 U.S. 296, 304-5, 60 S.Ct. 900, 903-4 (1940); *ISKCON, Inc. vs. Rochford*, 505 F.2d 263, 270 (7th Cir. 1978); *Fernandez vs. Limmer*, 465 F.Supp. 493, 497 (N.D.Tex. 1979); *ISKCON, Inc. vs. Lentini, supra* at 51; *Hall vs. McNamara*, 456 F.Supp. 245, 246 (N.D.Cal. 1978); *ISKCON, Inc. vs. Bowen*, 456 F.Supp. 437, 441 (S.D.Inc. (sic) 1978); *ISKCON of Berkeley, Inc. vs. Kearnes*, 454 F.Supp. 116, 118 (E.D.Cal. 1978); *ISKCON, Inc. vs. Engelhardt*, 425 F.Supp. 176, 179 (W.D.Mo. 1977).

The Minnesota Charitable Solicitations Act regulates conduct presumptively entitled to First Amendment protection. It requires registration before there can be solicitation. It further provides for abridgement of the right to solicit and allows for the imposition of criminal sanctions, whether or not a person is registered.

Rules restricting First Amendment expression are inherently suspect, and bear a heavy presumption against their constitutional validity. *Shuttlesworth vs. Birmingham, supra*; *Bantom Books vs. Sullivan*, 372 U.S. 58, 83 S.Ct. 631 (1968); *Hall vs. McNamara, supra*. Specific restrictions on First Amendment expression can be justified only by compelling governmental interest which is unachievable by any less restrictive alternative: "The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest." *Elrod vs. Burns, supra*, 427 U.S. 347, 362, 96 S.Ct. 2673, 2684 (1976). *Buckley vs. Valeo*, 424 U.S. 1, 96 S.Ct. 612 (1976); *ISKCON, Inc. vs. Lentini, supra* at 53; *ISKCON, Inc. vs. Bowen, supra* at 443.

To sustain an attack against its constitutionality, a statute which constitutes a prior restraint must seek to restrain only speech which is unprotected and must be designed to filter out those who will engage in protected speech from those who will

engage in unprotected speech, restraining only the latter. *ISKCON of Berkeley, Inc. vs. Kearnes, supra* at 119-120. To the extent that protected speech is restricted in the absence of a compelling government interest, a statute must be determined to be unconstitutional.

In the instant case, the defendants contend that even if the Act is unconstitutional as applied to religious organizations, the Unification Church, as a non-religious entity, must still comply. Thus, the defendants raise a question, in the first instance, of whether or not the activity in which plaintiffs seek to engage is, indeed, protected at all.

In such situations, the standards set forth in *Freedman vs. Maryland, supra,* are appropriate for consideration. In that case, it was held that a process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under standards designed to obviate the dangers of a censorship system: (1) The burden of proving that the film is unprotected expression must rest on the censor; (2) the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing of the film; (3) any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution; and (4) the procedure must assure a prompt final judicial decision. *Freedman vs. Maryland, supra,* 380 U.S. at 56.

When the subject matter of the dissemination concerns a religious practice, the need for such safeguards is even more compelling. *ISKCON of Western Pennsylvania, Inc. vs. Griffin,* 437 F.Supp. 666, 670 (W.D.Pa. 1977). And when the means of dissemination is interpersonal verbal communication rather

than film or writing, the problem of promulgating and adhering to strict enough due process standards becomes even more difficult to resolve. As the *Kearnes* court pointed out,

> "The problem of prediction is the key to the doctrine of prior restraint. For example, prior restraints are permissible to a limited extent in obscenity cases because one knows the content of the speech before it takes place. In most instances, however, one cannot know precisely what activity an individual will pursue, and thus any system which conditions the right to speak upon a finding of whether or not the individual is likely to engage in protected speech generally will involve a significant margin of error such that some persons will be wrongfully restrained from exercising their constitutional rights, while others are permitted to engage in proscribed activity. Within this margin or error, the officials administering the system will have latitude to exercise their judgment and discretion. Necessarily, the possibility of censorship is introduced and First Amendment guarantees threatened." *ISKCON of Berkeley, Inc. vs. Kearnes, supra* at 122. *See also, Southeastern Promotions, Inc. vs. Conrad,* 420 U.S. 546, 558-9, 95 S.Ct. 1239 (1975); *Hall vs. McNamara, supra* at 247.

In order to support a prior restraint under such dubious circumstances, there must exist a clear and present danger that a substantive evil will result, or that the gravity of the evil to be avoided, discounted by the likelihood it will not occur, justifies such an invasion of free speech. Where the evil to be avoided is fraud, the state must show a high probability that the individual is about to engage in the proscribed conduct. *ISKCON of Berkeley, Inc. vs. Kearnes, supra* at 123.

1. *Cease and Desist Provision*

Section 309.534, subd. 1, seeks to ensure compliance with the requirements of the Act as follows:

> "Whenever it appears to the commissioner that any person has engaged or is about to engage in any act or practice constituting a violation of this chapter or any rule or order hereunder:
>
> "(a) He shall have the power to issue and cause to be served upon the person an order requiring him to cease and desist from violations of sections 309.50 to 309.61. The order shall be calculated to give reasonable notice of the rights of the person to request a hearing thereon and shall state the reason for the entry of the order. A hearing shall be held not later than seven days after the request for the hearing is received by the commissioner after which and within 20 days of the date of the hearing the commissioner shall issue a further order vacating the cease and desist order or making it permanent as the facts require. All hearings shall be conducted in accordance with the provisions of chapter 15. If the person to whom a cease and desist order is issued fails to appear at the hearing after being duly notified, the person shall be deemed in default, and the proceeding may be determined against him upon consideration of the cease and desist order, the allegations of which may be deemed to be true. The commissioner may adopt rules of procedure concerning all proceedings conducted pursuant to this subdivision.
>
> "(b) He may bring an action in the district court in the appropriate county to enjoin the acts or practices and to enforce compliance with sections 309.50 to 309.61 or any rule or order thereunder and he may refer the matter

to the attorney general to prosecute violations as set forth in sections 309.57 and 309.59."

The due process safeguards contained in this provision of the Act are inadequate to support the imposition of prior restraint upon First Amendment religious expression rights in light of the degree of seriousness of the evil sought to be proscribed. A simple application of the *Freedman* standards, which this court considers to provide only minimal protection, reveals the inadequacies most plainly.

First, the burden of proving that the activity in which the state believes a person is about to engage is not protected is not expressly placed on the Commissioner. Indeed, a cease and desist order may be issued in the first instance upon an administrator's non-adversary determination that the person had engaged in or is about to engage in any act or practice which is a violation of the Act, including solicitation prior to registration. Furthermore, as regards court enforcement of administrative cease and desist orders, section 309.534, subd. 1(b), requires only a "proper showing" for an injunction to issue. Thus, the Act does not comply with the *Freedman* burden of proof criterion.

Second, the restraint which the statute forces upon the exercise of the First Amendment rights of one claiming a religious exemption does not preserve the status quo, but rather destroys it, because the status quo for a religious organization is unhindered exercise of those rights. This too flies in the face of the procedural proscriptions of *Freedman*.

Finally, the cease and desist order may stay in effect for the seven days the Department may lawfully wait before holding an administrative hearing plus the 20 days which the Commissioner may take to decide the matter, and then an undetermined amount of time between the Department's final decision

and the resolution of an appeal by the district court. No stays are mandatory during either the administrative process or the appeal. This is also insufficient. *See National Socialist Party of America vs. Skokie*, 432 U.S. 43, 97 S.Ct. 2205 (1977).

Because of the vague provisions contained within the statute pertaining to the requirements for proper registrations (section 309.52) and grounds for suspension or revocation of a registration (section 309.532), the amount of standardless discretion is too great for the degree of procedural protection afforded. *Cantwell vs. Connecticut, supra*, 310 U.S. at 305, 60 S.Ct. at 904. *See* Report, pp. 13-15.

2. *Criminal Penalties*

Section 309.581 of the Act provides that any person who "wilfully and knowingly" violates any provision of the Act is subject to criminal misdemeanor liability. Since registration is required under the Act before solicitation may take place, a person claiming a religious exemption may be prosecuted for failing to register prior to solicitation even though the state has never shown up to that point that the person was not exempt from registration because of its status as a religious organization.

Criminal enforcement of this type of prior restraint is not permissible. *See Cantwell vs. Connecticut, supra*; *Schneider vs. State*, 308 U.S. 147, 60 S.Ct. 146 (1939); *Lovell vs. City of Griffin*, 303 U.S. 444, 58 S.Ct. 666 (1938). Therefore, section 309.581 is void as to anyone claiming a religious exemption to the Charitable Solicitations Act.

CONCLUSION

While a factual dispute exists as to the legitimacy of the plaintiffs' claim to be a religious organization and members thereof, the legal issue of whether or not the Minnesota

Charitable Solicitations Act is constitutional in its application to religious solicitors does not rest upon a resolution of this factual issue. The overbreadth doctrine gives the plaintiffs standing to challenge the Act's constitutionality by motion for summary judgment.

The Act is facially unconstitutional as applied to religious organizations and members thereof because section 309.515 (b) exempts some religious organizations and not others from the requirements of the act, thus creating a preference offensive to the Establishment Clause of the First Amendment. The Act is entirely void as to such organizations and individuals.

As applied to non-religious organizations, none of the substantive provisions of the Act are found to be unconstitutional.

As applies to plaintiffs, however, and to other persons whose claims for religious exemption from the registration requirements of the Act are challenged by the state, both the cease and desist provision, section 309.534, subd. 1(a), and the criminal penalty provision, section 309.581, constitute prior restraints offensive to the Due Process Clause of the Fourteenth Amendment. The constitutionality of the registration revocation and suspension provision, section 309.532, is not justiciable at this time.

* * *

Wherefore,

IT IS HEREBY RECOMMENDED that the District Court enter an order granting plaintiffs' motion for summary judgment in part and denying it in part and granting defendants' motion for partial summary judgment in part and denying it in part, as follows:

(1) Declaring and adjudging the Minnesota Charitable Solicitations Act, Minn. Stat. §§309.50 *et seq.*, to be unconstitutional as applied to religious organizations and members thereof;

(2) Declaring and adjudging the Act to be constitutional as applied to non-religious organizations and members thereof;

(3) Declaring and adjudging sections 309.534, subd. 1(a), and 309.581 of the Act to be unconstitutional as applied to persons claiming to be religious organizations or members thereof;

(4) Declaring and adjudging the constitutionality of the application of section 309.532 to plaintiffs and others whose claims to a religious exemption are challenged by the state to be a nonjusticiable issue.

(5) Permanently enjoining the Commissioner of Securities from enforcing the Act as to any and all religious organizations;

(6) Permanently enjoining the Commissioner of Securities from utilizing sections 309.534, subd. 1(a), and 309.581 to enforce the Act as against plaintiffs and other persons claiming to be religious organizations or members thereof.

Dated: November 15, 1979.

ROBERT G. RENNER
United States Magistrate

All objections must be filed with the Clerk of Court, Minneapolis, Minnesota, within 10 days of receipt of a copy of the Report and Recommendation.

APPENDIX C1

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil 4-78-453

Pamela Valente, Larry Barber, Larry Haft and Kimberly Korman, and the Holy Spirit Association for the Unification of World Christianity,

Plaintiffs,

vs.

John R. Larson, Commissioner of Securities, Minnesota Department of Commerce; Warren Spannaus, Minnesota Attorney General; individually and in their official capacities,

Defendants.

ORDER

Based upon the May 3, 1979, report and recommendation of the Honorable Robert G. Renner, United States Magistrate, District of Minnesota,

IT IS HEREBY ORDERED that the defendants' motion to dismiss be in all things denied and that the plaintiffs' motion for a preliminary injunction be granted.

Dated: July 5, 1979.

MILES W. LORD
United States District Judge

APPENDIX C2

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil 4-78-453

Pamela Valente, Larry Barber, Larry Haft and Kimberly Korman, and the Holy Spirit Association for the Unification of World Christianity,

Plaintiffs,

vs.

John R. Larson, Commissioner of Securities, Minnesota Department of Commerce; Warren Spannaus, Minnesota Attorney General; individually and in their official capacities,

Defendants.

REPORT AND RECOMMENDATION

The plaintiffs having moved for a preliminary injunction and the defendants having moved for dismissal of the complaint, all motions came on for hearing before the undersigned United States Magistrate Judge on January 25, 1979, pursuant to order of the Honorable Miles W. Lord, Judge of the United States District Court, in accordance with 28 U.S.C. §636(b)(1)(B).

Representing the plaintiffs were Barry A. Fisher, of Beverly Hills, California and Joseph T. Dixon, Jr. of the firm of Henson & Efron, Minneapolis, Minnesota. Appearing in behalf of the defendants were Christine M. Luzzie and Karen Schanfield, Special Assistant Attorneys General, State of Minne-

sota. Americans United for Separation of Church and State appeared through its attorney Robert Nixon in the capacity as *amicus curiae*. An amicus brief has subsequently been received from the Minnesota Council on Foundations. The court, having considered the arguments and briefs as well as the files and records herein, makes the following Report and Recommendation.

I. FACTUAL BACKGROUND

Plaintiff Holy Spirit Association for the Unification of World Christianity, also known as Unification Church (hereinafter the "Church"), is a California non-profit religious corporation. Plaintiffs Larry Haft, Pamela Valente, Larry Barber and Kimberly Korman are members of the Church and followers of its tenets. The Church has been granted tax exempt religious organization status by the United States Internal Revenue Service and the State of Minnesota.

John R. Larson, at the commencement of this lawsuit, was the Commissioner of securities of the State of Minnesota. Warren Spannaus is the Attorney General of the State of Minnesota. As Commissioner of Securities and as Attorney General, respectively, the defendants are responsible for the implementation and enforcement of the Minnesota Charitable Solicitations Act, Minn. Stat. §§309.50-309.61 (1978) (hereinafter the "Act"). Furthermore, by statute and by common law tradition, it is the responsibility of the Attorney General in the State of Minnesota to oversee the handling and application of all funds impressed with a charitable trust.

The Act, originally enacted in 1961, creates a system of registration and disclosure designed to protect the contributing public and charitable beneficiaries against fraudulent practices in the raising of money for purportedly charitable purposes. Under it, a charitable organization must register

with the Minnesota Department of Commerce (hereinafter "Department") prior to soliciting contributions. Minn. Stat. §309.52 (1978). The Act also prohibits fraudulent fund raising practices and requires solicitors to identify themselves to persons solicited.

Prior to 1978, religious organizations were exempted from the registration requirement. However, Minn. Laws 1978, ch. 601, §5, effective March 29, 1978, amended the Act so as to require certain religious organizations to register.

In September 1978, the Church was notified by the Department that it was required to register. The Church thereupon requested a one-month grace period, which request was granted. Nine days later, on October 11, 1978, this action was commenced by the four individual plaintiffs herein to enjoin the Act's enforcement on the ground that it unconstitutionally infringes upon their first Amendment rights of expression and religion. The motion for a preliminary injunction was filed on the same date. The Church itself was subsequently joined as a party plaintiff by stipulation of the parties and order of the court dated January 26, 1979.

When, upon the expiration of the thirty-day grace period, the Church had not registered, the State, by its Attorney General and Commissioner of Securities, the defendants herein, commenced an action to enforce the registration statute in Minnesota state district court.

On November 6, 1978, the defendants moved this court to abstain from deciding the instant case and dismiss it. The state court action has now been stayed by the January 26, 1979 stipulation and order until the federal action has been disposed of.

Section 309.52, subd. 1, of the Act precludes any charitable organization, including non-exempt churches, from soliciting

contributions unless prior thereto it files a registration statement containing the following information:

"(a) Legally established name.

(b) Name or names under which it solicits contributions.

(c) Form of organization.

(d) Date and place of organization.

(e) Address of principal office in this state, or, if none, the name and address of the person having custody of books and records within this state.

(f) Names and addresses of officers, directors, trustees, and chief executive officer.

(g) Federal and state tax exempt status.

(h) Denial at any time by any governmental agency or court of the right to solicit contributions.

(i) Date on which accounting year of the charitable organization ends.

(j) General purposes for which organized.

(k) General purposes for which contributions to be solicited will be used.

(l) Methods by which solicitation will be made.

(m) Copies of contracts between charitable organization and professional fund raisers relating to financial compensation or profit to be derived by the professional fund raisers. Where any such contract is executed after filing of the registration statement, a copy thereof shall be filed within seven days of the date of execution.

(n) Board, group or individual having final discretion as to the distribution and use of contributions received.

(o) The amount of total contributions received during the accounting year last ended.

(p) Such other information as the department may by rule or order require to promote fairness of the solicitation and

to assure full and fair disclosure of all material information to the department."

Section 309.53 requires such organizations to submit annual reports including a financial statement which

> "shall include a balance sheet, statement of income and expense, and statement of functional expenses, shall be consistent with forms furnished by the department, and shall be prepared in accordance with generally accepted accounting principles so as to make a full disclosure of the following, including necessary allocations between each item and the basis of such allocations:
>
> (a) Total receipts and total income from all sources;
>
> (b) Cost of management and general;
>
> (c) Cost of fund raising;
>
> (d) Cost of public education;
>
> (e) Funds or properties transferred out of state, with explanation as to recipient and purpose;
>
> (f) Total net amount disbursed or dedicated within this state, broken down into total amounts disbursed or dedicated for each major purpose, charitable or otherwise;
>
> (g) Names of professional fund raisers used during the accounting year and the financial compensation or profit resulting to each professional fund raiser. Unless otherwise required by this subdivision, the financial statement need not be certified."

Section 309.532, subd. 1, authorizes the state to suspend or revoke any registration if it finds that such action is in the public interest and that the registrant:

"(a) has filed an application for a license or registration which is incomplete in any material respect or contains any statement which, in light of the circumstances under which

to assure full and fair disclosure of all material information to the department."

Section 309.53 requires such organizations to submit annual reports including a financial statement which

> "shall include a balance sheet, statement of income and expense, and statement of functional expenses, shall be consistent with forms furnished by the department, and shall be prepared in accordance with generally accepted accounting principles so as to make a full disclosure of the following, including necessary allocations between each item and the basis of such allocations:
>
> (a) Total receipts and total income from all sources;
>
> (b) Cost of management and general;
>
> (c) Cost of fund raising;
>
> (d) Cost of public education;
>
> (e) Funds or properties transferred out of state, with explanation as to recipient and purpose;
>
> (f) Total net amount disbursed or dedicated within this state, broken down into total amounts disbursed or dedicated for each major purpose, charitable or otherwise;
>
> (g) Names of professional fund raisers used during the accounting year and the financial compensation or profit resulting to each professional fund raiser. Unless otherwise required by this subdivision, the financial statement need not be certified."

Section 309.532, subd. 1, authorizes the state to suspend or revoke any registration if it finds that such action is in the public interest and that the registrant:

"(a) has filed an application for a license or registration which is incomplete in any material respect or contains any statement which, in light of the circumstances under which

it is made, is false or misleading with respect to any material fact;

(b) has engaged in a fraudulent, deceptive or dishonest practice;

(c) is permanently or temporarily enjoined by any court of competent jurisdiction from engaging in or continuing any conduct or practice involving any aspect of charitable solicitations; or

(d) has violated or failed to comply with any provision of this chapter or any rule or order under this chapter."

Section 309.555 requires that registration shall be denied to any charitable organization which expends an unreasonable amount for management and general costs and fund raising costs. It creates a rebuttal presumption that expenditures in excess of 30 percent of total income and revenue are unreasonable.

Section 309.532 further provides:

"Subd. 3. The department may issue an order requiring a licensee or registrant or applicant for a license or registration to show cause why the license or registration should not be revoked or suspended or the application denied. The order shall be calculated to give reasonable notice of the time and place for hearing thereon, and shall state the reasons for the entry of the order. All hearings shall be conducted in accordance with the provisions of chapter 15 [Administrative Procedure Act, Minn. Stat. §15.041 *et seq.* and, in particular §§15.0423 and 16.0424]. After the hearing, the department shall enter an order making such disposition of the matter as the facts require. If the licensee, registrant or applicant fails to appear at a hearing of which he has been duly notified, such person shall be deemed in default, and the proceeding may be

determined against him upon consideration of the order to show cause, the allegations of which may be deemed to be true.

Subd. 4. The hearing may be conducted by a hearing examiner. The examiner shall make proposed findings of fact and submit them to the department. The department shall have the power to compel the attendance of witnesses, to examine them under oath, to require the production of books, papers and other evidence, and to issue subpoenas and cause the same to be served and executed in any part of the state.

Subd. 5. Order of the department shall be subject to judicial review pursuant to chapter 15.

Subd. 6. The commissioner of securities of the department of commerce may promulgate rules of procedure concerning all hearings and other proceedings conducted pursuant to this chapter."

Section 309.533 empowers the Commissioner to investigate possible violations and to demand the attendance of witnesses and production of documents.

Section 309.534, subd. 1, seeks to ensure compliance with the requirements of the Act as follows:

"Whenever it appears to the commissioner that any person has engaged or is about to engage in any act or practice constituting a violation of this chapter or any rule or order hereunder:

(a) He shall have the power to issue and cause to be served upon the person an order requiring him to cease and desist from violations of sections 309.50 to 309.61. The order shall be calculated to give reasonable notice of the rights of the person to request a hearing thereon and shall state the reason for the entry of the order. A

hearing shall be held not later than seven days after the request for the hearing is received by the commissioner after which and within 20 days of the date of the hearing the commissioner shall issue a further order vacating the cease and desist order or making it permanent as the facts require. All hearings shall be conducted in accordance with the provisions of chapter 15. If the person to whom a cease and desist order is issued fails to appear at the hearing after being duly notified, the person shall be deemed in default, and the proceeding may be determined against him upon consideration of the cease and desist order, the allegations of which may be deemed to be true. The commissioner may adopt rules of procedure concerning all proceedings conducted pursuant to this subdivision.

(b) He may bring an action in the district court in the appropriate county to enjoin the acts or practices and to enforce compliance with sections 309.50 to 309.61 or any rule or order thereunder and he may refer the matter to the attorney general to prosecute violations as set forth in sections 309.57 and 309.59."

Section 309.581 provides criminal sanctions for violations.

Section 309.515, subd. 1, exempts those charitable organizations which did not receive contributions in excess of $10,000 in the preceding year, and those religious organizations which received in the preceding year more than half of their contributions from: (1) persons who are members of the religious organization, or (2) from a parent or affiliated organization; or (3) from a combination of the sources listed in (1) and (2). The term "member" excludes those who are granted membership upon making a contribution as a result of a solicitation.

During the 17 years of the Act's existence, more than 1,200 charities have registered. The State has never revoked or suspended a registration but, instead, has obtained injunctions against violation of its substantive prohibitions. The Act has never been judicially interpreted, nor have rules or regulations which might clarify its provisions been issued.

The individual plaintiffs claim to travel throughout the United States proselytising and performing "missionary religious work" on behalf of the Church. They portray themselves as concerned principally with the propagation of their religious, beliefs.

Both prior to an after the 1978 amendments, the plaintiffs have solicited charitable contributions in the State of Minnesota, allegedly in connection with their religious mission. They wish to do so in the future, as in the past, without complying with the registration requirements.

Plaintiffs assert that their fund-raising activities constitute religious expression protected under the First Amendment to the United States Constitution. However, if plaintiffs engage in fund raising without first complying, they would be subject to civil enforcement proceedings and possible criminal prosecution for their failure to comply. Thus, they claim that the Act, both on its face and in its application to them, abridges their exercise of freedom of speech, press and religion, arbitrarily deprives them of their liberty and property without due process of the law; capriciously denies them equal protection of the laws; and is vague, ambiguous and overbroad, all in violation of the First and Fourteenth Amendments of the United States Constitution. They say, therefore, that its enforcement as against them must be enjoined.

The defendants counter that the Act is not unconstitutional and that, in any event, the plaintiffs are not a religious organi-

zation or members thereof and therefore have no standing to raise the issue. They further assert that the court should abstain from accepting jurisdiction because the state courts have not yet had the opportunity to issue an authoritative interpretation of the allegedly unconstitutional provisions.

II. DEFENDANTS' MOTION TO DISMISS

Lack of standing and abstention are the legal bases for the defendants' dismissal motion. Both fail to provide sufficient grounds.

A. *Standing*

Most of the defendants' arguments on the standing issue apply to the individual plaintiffs and are, as a practical matter, mooted by the joinder of the Church itself as a party plaintiff. Nonetheless, the court is convinced that with or without the Church as a named plaintiff there is sufficient standing on the part of the individual plaintiffs.

The defendants allege that the individual plaintiffs do not have a sufficient personal stake in the outcome of this case to invoke the court's jurisdiction in that they do not face a threat of prosecution for violating the Act. *See Baker vs. Carr*, 369 U.S. 186, 82 S.Ct. 691 (1962). They claim that plaintiffs have at no time been threatened with prosecution or even asked to comply. In fact, they point out, the state has never prosecuted anyone under the Act. Thus, they claim, plaintiffs' fear of prosecution is merely hypothetical. Defendants also claim that the possibility of civil enforcement as against these individuals is but slight.

Plaintiffs counter by pointing out that they are members of the Church and hold and follow its religious tenets. They claim that since the Act empowers the State to enjoin their solicitations if the Church does not register, they are real par-

ties in interest, and have sufficient standing to bring this action.

The defendants follow with heavy testimonial barrage against the Church's claim that it is a religion. These depositions are in direct contradiction to evidence in the form of affidavits submitted by the plaintiffs.

Plaintiffs claim that the registration requirements as applied to their Church deprive them of First and Fourteenth Amendment rights. The first part of their claim is that the statute is vague and overbroad.

The traditional rule of standing requires that a person to whom a statute may constitutionally be applied will not be allowed to challenge it on the ground that it might be unconstitutionally applied to others. Where, however, he challenges a statute affecting First Amendment rights as vague and overbroad he will be granted standing even though his own conduct is not privileged and could constitutionally be proscribed by a more concise and narrowly drawn statute. This is because the mere existence of such a law may cause persons not before the court to refrain from exercising their own First Amendment rights. *See Young vs. American Mini Theatres, Inc.*, 427 U.S. 50, 59, 96 S.Ct. 2440, 2447 (1976); *Broadrick vs. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908 (1973); *Freedman vs. Maryland*, 380 U.S. 51, 56 85 S.Ct. 734 (1965); *International Society for Krishna Consciousness (ISKCON), Inc. vs. Lentini*, 461 F.Supp. 49, 50-51 (E.D.La. 1978); *New York Civil Liberties Union, Inc. vs. Acito*, 459 F.Supp. 75, 81 (S.D.N.Y. 1978); *ISKCON, Inc. vs. Hays*, 438 F.Supp. 1077, 1081 (S.D.Fla. 1977); *ISKCON, Inc. vs. Engelhardt*, 425 F.Supp. 176, 179 (W.D.Mo. 1977).

In the licensing and registration context, this is true whether or not the plaintiff has applied for a license or sought

to register. *Freedman vs. Maryland, supra*; *ISKCON, Inc. vs. Bowen*, 456 F.Supp. 437, 441 (S.D.Ind. 1978); *ISKCON of Berkeley, Inc. vs. Kearnes*, 454 F.Supp. 116, 118 (E.D.Cal. 1978); *ISKCON vs. Engelhardt, supra.*

Plaintiffs herein have made a significant showing, although challenged, regarding their religious motivations. This court is not presently in a position to rule whether the Church is, in fact, a religious organization within the Act, since it has not had an opportunity to adequately measure the credibility of the witnesses who have testified by affidavit and deposition. However, for the purposes of the instant motions, plaintiffs' allegations and present showing are sufficient to sustain their position as a religious organization and members of a religious organization.

In this regard, plaintiffs have several claims which give them a personal stake in the outcome of this litigation. They have claims under the Establishment clause relating to burdens which the Act places on the Church, including restriction of other First Amendment rights, and entanglements it creates. They have claims that their rights of association and privacy as well as their rights of equal protection and due process under the Fourteenth Amendment are violated. *See Association of Data Processing Organizations vs. Camp*, 397 U.S. 150, 154, 90 S.Ct. 827, 830 (1970); *McGowan vs. Maryland*, 366 U.S. 420, 429-430, 81 S.Ct. 1101, 1106-1107 (1961); *School District of Abington Township vs. Schempp*, 374 U.S. 203, 224 n. 9, 83 S.Ct. 1506, 1572 (1963).

There can be no question but that both the Church and the individual plaintiffs have standing to maintain this action.

B. *Abstention*

The defendants, in support of their dismissal motion, also maintain that the state courts should have the opportunity

to rule on claims of the Act's unconstitutionality and that this court should, therefore, abstain under the *Pullman* abstention doctrine from handling the case. *Railroad Commission of Texas vs. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643 (1941). They point out that since the Act was enacted 17 years ago, over 1,200 charitable organizations have registered under the Act without contest to its validity. They also point out that there is presently pending before the state courts a case involving the same church and issues.

Application of the *Pullman* doctrine is appropriate "'in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law.' *County of Allegheny vs. Frank Masuda Co.*, [360 U.S. 185, 189, 79 S.Ct. 1060 (1959)]." *Colorado River Water Conservation District vs. United States*, 424 U.S. 800, 814, 96 S.Ct. 1236 (1976).

However, abstention is to be regarded with some degree of hesitance where a statute is challenged as facially unconstitutional under the First Amendment. *Procunier vs. Martinez*, 416 U.S. 396, 401-404, 94 S.Ct. 1800, 1805 (1974); *Zwickler vs. Koota*, 389 U.S. 241, 252, 88 S.Ct. 391, 397 (1967); *Sovereign News Co. vs. Falke*, 448 F.Supp. 306, 381-383 (N.D. Ohio 1977).

Moreover, abstention cannot be ordered simply to give state courts the first opportunity to vindicate the federal claim. The role of state courts in determining state law does not diminish the primacy of the federal courts in deciding questions of federal law. This is particularly true where the constitutionality of a state law is attacked as being in variance with First Amendment rights *Steffel vs. Thompson*, 415 U.S. 452, 472-473, 94 S.Ct. 1209, 1222 (1974); *Zwickler vs. Koota, supra*,

389 U.S. at 251, 252; *England vs. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461 (1964).

Because this case involves federal constitutional claims concerning the Act's facial validity, the court is of the opinion that it may properly exercise its jurisdiction and that abstention would not be appropriate. *See ISKCON, Inc. vs. Hays, supra* at 1081.

III. PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

The complaint seeks declaratory and injunctive relief pursuant to 42 U.S.C. §1983 and 28 U.S.C. §§2201 & 2202. It asserts that the Act is constitutionally defective because, among other grounds: (1) it vests discretion in officials to suspend or revoke licenses involving the exercise of First Amendment rights without delineating precise and objective standards; (2) its procedures respecting suspensions, revocations and appeals fail to comply with due process; (3) it establishes overly broad investigatory powers to requisition church records and to interrogate church officials and thus entangles the state in Church affairs; (4) it prefers, in its application, certain churches over others; and (5) it infringes upon rights of privacy and association.

Plainly, a preliminary injunction is the appropriate interlocutory remedy to prevent enforcement of a law that is facially inconsistent with the constitution. *Doran vs. Salem Inn, Inc.*, 422 U.S. 922, 931, 95 S.Ct. 2561, 2567 (1975). In the Eighth Circuit, there are two alternative tests which govern the determination of whether such an injunction should issue.

The first is, as stated in *Minnesota Bearing Co. vs. White Motor Corp.*, 470 F.2d 1323, 1326 (8th Cir. 1973), as follows:

"In order to justify the issuance of a preliminary injunc-

tion by the trial court, the movant has the burden of showing:

(1) substantial probability of success at trial by the moving party, and

(2) irreparable injury to the moving party absent such issuance.

Other factors which may be considered in the decision to grant or to deny the request are the absence of substantial harm to other interested parties, and the absence of harm to the public interest."

In *Fennell vs. Butler*, 570 F.2d 263, 264 (8th Cir. 1978), the Court also recognized the second, and alternative, test:

"[A] preliminary injunction should issue

'upon a clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.' [citations omitted]"

There can be no doubt that solicitation in connection with the dissemination of information and espousal of religious beliefs is an activity protected by the First Amendment. *Murdock vs. Pennsylvania*, 319 U.S. 105, 109, 111, 63 S.Ct. 870, 873, 874 (1943); *Cantwell vs. Connecticut*, 310 U.S. 296, 304-305, 60 S.Ct. 900, 903-904 (1940); *ISKCON, Inc. vs. Rochford*, 505 F.2d 263, 270 (7th Cir. 1978); *Fernandez vs. Limmer*, 465 F.Supp. 493, 497 (N.D.Tex. 1979); *ISKCON, Inc. vs. Lentini, supra* at 51; *Hall vs. McNamara*, 456 F.Supp. 245, 246 (N.D.Cal. 1978); *ISKCON, Inc. vs. Bowen, supra* at 441; *ISKCON of Berkeley, Inc. vs. Kearnes, supra* at 118; *ISKCON, Inc. vs. Engelhardt, supra* at 179.

Since it is well established that the loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury, *Elrod vs. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2690 (1976); *Swearson vs. Meyers*, 455 F.Supp. 88, 91 (D.Kan. 1978); *ISKCON, Inc. vs. Hays, supra* at 1081; the primary inquiry here must be as to the likelihood that plaintiffs will succeed on the merits.

The court finds that there is a substantial likelihood that plaintiffs will, indeed, succeed on the merits on at least some of its challenges.

A. *Due Process Violations*

The plaintiffs argue that the Act violates their due process rights both because of its vagueness and because of its procedurally deficient imposition of prior restraint on the exercise of First Amendment rights.

The Minnesota Charitable Solicitations Act regulates conduct presumptively entitled to First Amendment protection. It requires registration *before* there can be solicitation. It further provides for revocation and suspension of the right to solicit. Furthermore, since its purpose is the protection of the public from fraudulent solicitations, it is content directed and subject to the strictest standards for application of prior restraints. *See ISKCON of Berkeley, Inc. vs. Kearnes, supra.*

Rules restricting First Amendment expression are inherently suspect, and bear a heavy presumption against their constitutional validity. *Shuttlesworth vs. Birmingham*, 394 U.S. 147, 89 S.Ct. 935 (1969); *Bantom Books vs. Sullivan*, 372 U.S. 58, 83 S.Ct. 631 (1968); *Hall vs. McNamara, supra.* Specific restrictions on First Amendment expression can be justified only by compelling governmental interest which is unachievable by any less restrictive alternative: "The interest advanced must be paramount, one of vital importance, and the

burden is on the government to show the existence of such an interest." *Elrod vs. Burns, supra,* 427 U.S. at 362, 96 S.Ct. at 2684 (1976). *Buckley vs. Valeo,* 424 U.S. 1, 96 S.Ct. 612 (1976); *ISKCON, Inc. vs. Lentini, supra* at 53; *ISKCON, Inc. vs. Bowen, supra* at 443.

To sustain an attack against its constitutionality, a statute which constitutes a prior restraint must seek to restrain only speech which is unprotected and must be designed to filter out those who will engage in protected speech from those who will engage in unprotected speech, restraining only the latter. *ISKCON of Berkeley, Inc. vs. Kearnes, supra* at 119-120. To the extent that protected speech is restricted in the absence of a compelling government interest, a statute must be determined to be unconstitutional.

Under the statute here at issue the Department is empowered to suspend or revoke a registration of it finds "(1) that the order is in the public interest, and (2) that the . . . registrant . . . (a) has filed . . . [a] registration which is incomplete in any material respect or contains any statement which, in light of the circumstances under which it is made, is false or misleading with respect to any material fact", (b) has engaged in a deceptive practice, (c) has been enjoined from soliciting in another jurisdiction; or (d) has failed to comply with "any provision" of the Act. Minn. Stat. §309.532. One registers upon filing a registration statement; thus, registration cannot be denied in the classic sense.

The Department's procedural enforcement alternatives include the following: (1) suspension or revocation of the registration following an administrative show cause hearing under the Administrative Procedure Act (section 309.532 subd. 3); (2) issuance of a cease and desist order to be followed by a hearing within seven days and a final determination within

20 days (section 309.534 subd. 1(a)); or (3) court action seeking a prohibitive temporary restraining order and injunction. Standard judicial review procedures are available under each.

Defendants first argue that no prior restraint is involved because they do not have the power to deny a registration. *See State vs. Wernet*, No. 66894, slip op. at 4 (Minn. Dist. Ct. July 31, 1978).

However, this court sees little difference in a system which allows a state to revoke or suspend a registration immediately after it is filed, or which allows the state to refuse to accept a statement for filing, from one which allows the state to deny the registration in the first instance. It is not the denial of a license *per se*, but rather the effective denial of permission to engage in religious solicitation which can well result in a constitutionally defective prior restraint of an exercise of protected First Amendment rights. *Hynes vs. Mayor of Oradell*, 425 U.S. 610, 622, 96 S.Ct. 1755, 1761 (1976).

Next, the interest asserted by defendants in support of its regulatory scheme is the prevention of fraud, a justification frequently used for registration and licensing laws. This court is aware of the problems of fraudulent solicitations and the state's interest in protecting its citizenry. As the Supreme Court stated in *Cantwell vs. Connecticut, supra*, 310 U.S. at 306, 60 S.Ct. at 904,

> "Without doubt a state may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent."

The State, of course, is free, as always, to punish those who commit fraud, and thus to deter such behavior. The defendants claim, however, that this method of deterrence is a difficult

and inefficient means of protecting the public against the type of fraudulent activity here sought to be circumscribed. Nevertheless, the State's interest in the prevention of fraud cannot be allowed to diminish the strict standards relating to First Amendment protections. *See Hynes vs. Mayor of Oradell, supra.*

In *Schneider vs. State*, 308 U.S. 147, 164, 60 S.Ct. 146 (1939), the Supreme Court answered the plea that traditional law enforcement methods are alone unable to protect its interest, saying:

> "If it is said that these means are less efficient and convenient than bestowal of power on police to decide what information may be disseminated . . ., and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press." *See also Cantwell vs. Connecticut, supra*; *ISKCON, Inc. vs. Bowen, supra.*

Clearly, the Act cannot survive because it does not meet the due process requirements which the Constitution affords to First Amendment activity. The registration requirements of the Act lack sufficient ascertainable standards and give state officials too much discretion to grant or deny the right to solicit. *See Cantwell vs. Connecticut, supra*; *ISKCON, Inc. vs. Rochford, supra*; *Swearson vs. Meyers, supra.*

1. *Vagueness Challenge.*

When a statute or regulation is challenged under the due process doctrine of vagueness, a court must look at the enactment from two angles: (1) Whether it provides sufficient notice of what may not be done, and (2) whether it contains reasonably clear guidelines so as to prevent official arbitrariness or discrimination in its enforcement. *Smith vs. Goguen*, 415 U.S. 566, 573, 93 S.Ct. 1242 (1974); *Grayned vs. City of Rock-*

ford, 408 U.S. 104, 108, 92 S.Ct. 2294 (1972); *ISKCON, Inc. vs. Rochford, supra* at 267.

Section 309.52, subd. 1(a) to (p), requires an organization wishing to solicit contributions to file a registration statement containing "without limitation" certain specific information about the organization. The Department may by "rule or order" require any other information "to promote fairness of the solicitation and to assure full and fair disclosure of all material information . . . ." Clearly, there is no limit, except by the Department's own determination of "fairness" and "full and fair disclosure" within the scope of the Administrative Procedure Act, to the amount and kind of information which may be required prior to acceptance of the registration statement for filing. Thus, the statute fails to provide notice of what is required for a successful registration.

While the state contends that the Department would not conduct itself in the egregious manner feared by the plaintiffs, it is no answer to an allegation that an enactment is void for vagueness to say that the statute would not be so applied. *Keyishian vs. Board of Regents*, 383 U.S. 589, 599, 87 S.Ct. 675, 681 (1967); *ISKCON, Inc. vs. Rochford, supra* at 270. Whether this section of the Act can pass constitutional muster under current vagueness standards is a question of law serious enough to enjoin its enforcement pending an ultimate determination.

Plaintiffs also legitimately complain of the standards, or lack of them, for suspension or revocation of a registration, in that the Department is allowed to suspend or revoke a registration if it finds that it is "in the public interest" *and* that one of four other criteria is met. Plaintiffs challenge the "public interest" part of the test as well as the "truth" and "fraud" criteria as being vague.

It is well settled that when a regulation subjects the exercise of First Amendment rights to the prior restraint of a license, it must be drawn with narrow, objective, and definite standards to guide the licensing authority. *Shuttlesworth vs. Birmingham, supra*; *ISKCON, Inc. vs. Lentini, supra* at 51; *Hall vs. McNamara, supra* at 247; *Swearson vs. Meyers, supra* at 91. To pass constitutional muster, the standards by which permission is granted or denied must be such as to make the registration process virtually ministerial. *Swearson vs. Meyers, supra*; *Hall vs. McNamara, supra.*

While it may appear at first blush that the criteria for suspension or revocation of a registration are quite objective, such criteria require "an appraisal of facts, the exercise of judgment and the formation of an opinion." *Cantwell vs. Connecticut, supra,* 310 U.S. at 305, 60 S.Ct. at 904. The "truth" test requires the Department to determine whether the registration statement is "incomplete in any material respect" or is "false or misleading with respect to any material fact." Under the "fraud" test, the Department must determine whether any registrant has engaged in a "fraudulent, deceptive or dishonest practice", presumably including representations as to the religious purpose of the solicitations.

If that portion of the statute which designates the kind of information that must be contained in the registration statement is so vague as to be unconstitutional, plainly a truth test encompassing a determination of how complete the statement is must likewise be found to be too vague. *See Hall vs. McNamara, supra* at 246. And, if newspaper publication cannot be enjoined from future publication upon a finding that it constitutes a "public nuisance" by printing "malicious, scandalous and defamatory" articles, clearly outside of the First Amendment ambit, as in *Near vs. Minnesota*, 283 U.S.

697, 51 S.Ct. 625 (1931), then it is certainly also true that a religious organization may not be denied the future exercise of its First Amendment rights simply upon some administrator's finding that it has abused those rights in the past. *See ISKCON of Berkeley, Inc. vs. Kearnes, supra* at 120-121; *Hall vs. McNamara, supra* at 247.

The mere coupling of these vague tests with an even more vague requirement that the Department must determine the suspension or revocation to be "in the public interest" cannot save this section. *See Southeastern Promotions vs. Conrad*, 420 U.S. 546, 553, 95 S.Ct. 1239, 1244 (1975).

Section 309.534, regarding cease and desist orders, is also attacked. Plaintiffs point out that this section not only carries forth the questionable features of the previously discussed sections but also contains objectionable features uniquely its own in that it allows the Commissioner to issue a cease and desist order not only upon a finding that a person has engaged in unlawful activity but also upon a finding that a person *is about to* do so.

Thus, it runs headlong into the thicket which was the subject of Judge Peckham's concern in *ISKCON of Berkeley, Inc. vs. Kearnes, supra* at 122, that:

> "The problem of prediction is the key to the doctrine of prior restraint. For example, prior restraints are permissible to a limited extent in obscenity cases because one knows the content of the speech before it takes place. In most instances, however, one cannot know precisely what activity an individual will pursue, and thus any system which conditions the right to speak upon a finding of whether or not the individual is likely to engage in protected speech generally will involve a significant margin of error such that some persons will be wrongfully re-

> strained from exercising their constitutional rights, while others are permitted to engage in proscribed activity. Within this margin or error, the officials administering the system will have latitude to exercise their judgment and discretion. Necessarily, the possibility of censorship is introduced and First Amendment guarantees threatened."

Plaintiffs' concerns with the scope of the Department's investigatory powers (section 309.533) also appear to be well founded. *See Hall vs. McNamara, supra* at 247.

2. *Procedural Challenge*

Even assuming the Minnesota Act could survive the challenges of vagueness, there is also the due process question regarding the procedures to be used in imposing the prior restraints.

The Act may well be within the proscription of *Freedman vs. Maryland, supra*, and its progeny:

> "Licensing arrangements which impinge upon the free exercise of First Amendment rights must provide strict procedural safeguards . . . absence of these safeguards [means] that the registrations were facially unconstitutional." *ISKCON vs. Rochford, supra* at 271.

In *Freedman*, it was held that a process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under standards designed to obviate the dangers of a censorship system: (1) The burden of proving that the film is unprotected expression must rest on the censor; (2) the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing of the film; (3) any restraint imposed in advance of a final judicial determination on the

merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution; and (4) the procedure must assure a prompt final judicial decision.

The constitutional policy underlying *Freedman* is even more compelling when the subject matter of dissemination concerns religious practice. *ISKCON of Western Pennsylvania, Inc. vs. Griffin*, 437 F.Supp. 666, 670 (W.D.Pa. 1977).

Plaintiffs fault the notice and hearing provisions of section 309.534 regarding cease and desist orders. They complain that, while the department has the power under section 309.534(1)(b) to seek court approval of penalties, it does not have to proceed under (1)(b), but may issue a cease and desist order under section 309.534(1)(a); that the order takes effect immediately upon service; that only an administrative hearing is required; and that there is no requirement that the State bear the burden of justifying its initial and continued suppression of presumptively protected speech.

The challenged review procedures are essentially those of the Minnesota Administrative Procedure Act (APA), Minn. Stat. §15.041-15.052 (1978), used by most state agencies to resolve contested proceedings.

Defendants concede that administrative decisions made under the APA, whether under the Charitable Solicitations Act or any other regulatory statute, may, on some occasions, affect protected First Amendment rights. They say, however, that the vast majority of decisions have no relationship to such rights, and that to require all such contested proceedings to be initiated in court to be decided within a specified period, simply because an agency decision may one day have First Amendment implications, will unduly burden the courts and negate the use of the Administrative Procedures Act.

Furthermore, defendants seriously question the extent to which the Act directly impinges on free speech. They claim that the purpose and intent of the statute is to provide a comprehensive program for supervision of charities which solicit from the public, that there is no regulation of content, and that there are no abusive restrictions of an organization's ability to solicit. They also argue that, in both the cease and desist and the revocation provisions of the challenged Act, the Department must obtain judicial enforcement of its order and must show, based upon the record, the decision to be proper.

The plaintiffs admit that some procedural safeguards are present; they question only whether these procedures satisfy due process standards.

This court has serious doubts as to whether they do. First, the fact that the review procedures for cases involving First Amendment rights are no different than those involving non-preferred rights and privileges bears ominously upon arguments that the special *Freedman*-like protections are present. Indeed, no specific recognition is made in either the Charitable Solicitations Act or the Administrative Procedure Act of the possibility that special procedural safeguards might in some cases be needed.

Second, the Act nowhere states upon whom the burden of proof rests regarding a showing that the conduct sought to be regulated is not protected by the First Amendment. While authoritative judicial interpretation may well eliminate this problem in the future, this does not help the defendants' case for the nonce.

Third, there is no specific assurance in the statute that a registration statement must be accepted for filing if it is deemed "incomplete" by the Department. Thus, solicitation could well be effectively blocked for an indefinite period.

Fourth, here the status quo is the activity of charitable solicitation. The Act empowers the Department to impose a prior restraint directed not at preserving the status quo but at destroying it. This, too, is an apparent violation of the *Freedman* standards.

Finally, the promptness of the review procedures may also be insufficient. For example, a cease and desist order may be in operation for seven days prior to an administrative hearing. After that as much as twenty days may be lost during the decision making process, following which judicial review may proceed at an undetermined pace. While stays are allowed during appeals from suspensions or revocations of registration, if suspension or revocation is not the action sought by the Department through its cease and desist order, there is no provision to protect on-going solicitations.

While the court does not now decide that these provisions are constitutionally infirm, it finds that the plaintiffs have raised serious questions which must be resolved before the Act can be enforced.

B. *Establishment Clause Violations*

Plaintiffs also complain that the exemptions as contained in section 309.515 facially discriminate against their religion in violation of the Establishment Clause of the First Amendment. Section 309.515(b) exempts from registration:

> "A religious society or organization which received more than half of the contributions it received in the accounting year last ended (1) from persons who are members of the organization; or (2) from a parent organization or affiliated organization; or from a combination of the sources listed in clauses (1) and (2) . . ."

The defendants argue that, because the challenged statute governs charitable solicitations generally, it could not be inter-

preted in such a manner as to aid one religion over another. While the defendants admit that the statute distinguishes between exempt and non-exempt churches, they seek to justify the distinction on grounds that there is a rational basis for differentiation.

It is the defendants' position that the membership criterion is valid because a regular church member is likely to have access to financial information and be generally aware of how his money is spent by the church. On the other hand, they contend, a religious organization which solicits from the public at large is not similarly answerable or accountable to its contributors.

It is well settled that a state may not aid, foster or promote one religion over another, nor may it be hostile to a particular religion. *Epperson vs. Arkansas*, 393 U.S. 97, 89 S.Ct. 266 (1968). In *Lemon vs. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105 (1971), the Supreme Court set forth a three-pronged test for determining whether government conduct constitutes an Establishment Clause violation:

> "Every analysis in this area must begin with consideration of the cumulative criteria developed by the court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither enhances nor inhibits religion, *Board of Education vs. Allen*, 392 U.S. 236, 243, 88 S.Ct. 1923, 1926 (1968); finally, the statute must not foster 'an excessive government entanglement with religion' *Walz* [*vs. Tax Commission*, 397 U.S. 664, 674, 90 S.Ct. 1409, 1414 (1970)]." *Lemon vs. Kurtzman, supra*, 403 U.S. at 612-613, 91 S.Ct. at 2111.

A statute which violates any of these three tests violates the First Amendment. *ISKCON, Inc. vs. Hays, supra.*

As to the second criterion, plaintiffs correctly point out that the exemptions of §309.515 do not apply to all groups which rely on members for support, nor does it withdraw from exemption all groups which solicit from the public at large. The Act arbitrarily mandates that in order to be exempted 50% of contributions must come from "members".

Members of the public who contribute to a church which solicits 49% of its contributions from the public have no more contact with it, nor is that church any more answerable to them, than if the church solicited 51% of its contributions from the public. Yet, in both instances, good faith solicitors, as well as the public, have the same interest to be protected by the State. Clearly, whatever its legislative purpose, the Act has the immediate effect of subjecting some churches to far more rigorous requirements than others.

The burden which the exemption lifts from the churches that qualify and which the statute imposes on those that do not, is onerous, indeed. The statute subjects them not only to filing a detailed registration statement, but also to filing an even more detailed annual report, including a financial statement involving comprehensive financial disclosure, to submitting to extensive state investigation, possible injunction or state receivership, and to holding open to public inspection all books and records. The effect of this is to severely inhibit plaintiffs' religious activities.

The entanglement criterion also poses serious doubts as to the Acts' validity. For example, as to plaintiffs challenges to section 309.52(1)(a)-(p), the required information regarding the collection, management, use, and dispersal of the solicited funds, as well as "such other information as the depart-

ment may . . . require . . . to assure disclosure of all material information . . ." connotes the State's deep and intricate involvement in monitoring detailed facets of a church's economy.

It is doubtful whether a religious organization can be compelled to explain the source and use of its revenues absent a showing of compelling need achievable by no adequate alternative. *Fernandez vs. Limmer, supra* at 504-505, and cases cited therein.

The perforced church-state intimacy pervades other challenged sections. Section 309.533(1)(a) gives the licensing official discretion to investigate the activities of a soliciting church based only on his determination that an investigation is "necessary". Limitations on his investigatory powers, or standards and guidelines for the exercise of those powers, are missing. As the court noted in *McCormick vs. Hirsch*, 460 F. Supp. 1337, 1355 (M.D.Pa. 1978),

> "The reach of the investigatory powers into the financial affairs of a church obviously create[s] the potential for breach of religious liberty."

The Act requires continuing, detailed scrutiny of churches and thrusts the State into close examination of the inner workings of religious institutions compelled to respond. In order to ensure that solicitations are used for permitted purposes the State must determine whether the moneys have been spent for religious or non-religious purposes. Minn. Stat. §309.555. To do this requires the State to evaluate religious practices and to engage in "the kind of involvement with the church entity that will simply not be tolerated." *McCormick vs. Hirsch, supra* at 1352. As the Supreme Court recently explained:

> "It is not only the conclusions that may be reached . . . which may impinge on the rights guaranteed by the Religion Clauses, but the very process of inquiry leading to findings and conclusions." *NLRB vs. The Catholic Bishop*

of Chicago, —— U.S. ——, 47 U.S.L.W. 4283, 4285 (March 21, 1979)

This court can only conclude that the plaintiffs have made a significant showing regarding the Act's inconsistency with the Establishment Clause.

C. *Free Exercise, Privacy and Association Rights Violations*

The plaintiffs also contend that the disclosure and investigation provisions of the Act violate their rights of free exercise of religion, freedom of association, and privacy.

In order to determine whether a statute is violative of the Free Exercise Clause the court must employ the three step analysis utilized in *Wisconsin vs. Yoder*, 406 U.S. 205, 92 S.Ct. 1526 (1972). First, the court must determine whether or not a legitimate religious belief is held by the plaintiffs and whether the activity affected by the statute is pervasively religious. Second, the court must inquire as to whether the statute places a burden or inhibition upon the plaintiffs' free exercise rights. Finally, assuming an affirmative answer to the first two inquiries, the court must decide if the burden is justified by a compelling state interest. *McCormick vs. Hirsch, supra* at 1351.

The court applies this mode of analysis to the facts of the instant case as follows:

First, as previously pointed out, plaintiffs have made a sufficient showing that their activity is pervasively religious and that the Church is the embodiment of a legitimate religious belief.

Second, as has also been previously noted, they have shown that the Act places a significant burden on the Church's free exercise rights.

Finally, they have shown that the State's interest in protecting the public from fraud, while certainly legitimate and reasonable, is not sufficiently compelling to sustain the constitutionality of the burden imposed, because "in this highly sensitive constitutional area [o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitations". *Sherbert vs. Verner*, 374 U.S. 398, 83 S.Ct. 1790 (1963), as cited in *McCormick vs. Hirsch, supra* at 1356.

Moreover, as the court pointed out in *Fernandez vs. Limmer, supra* at 504-505,

> "No church . . . should be compelled to bear itself of its membership lists and explain the source and use of each dollar without a showing of compelling need achievable by no adequate alternative. Unless such a need is established for disclosure . . . the potential for chilling effect on donors, members, and those who associate with the Society and deal with it financially is great, as is the impact on the churches' privacy. The rights of association and financial privacy are too great to be easily brushed aside [citations omitted]".

Plainly, there are serious questions as to whether the Act violates plaintiffs rights of free exercise of religion, privacy and freedom of association.

CONCLUSION

This court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§1331 and 1343. The plaintiffs, and each of them, have a significant stake in the outcome of this case and, therefore, have standing to sue. Application of the *Pullman* abstention doctrine would be inappropriate.

The issue before the court at this time is not, strictly speaking, the constitutionality of the Minnesota Charitable Solicitations Act, but rather whether or not the plaintiffs have made a sufficient showing to justify an injunction against its en-

forcement as to them. The court is convinced that the Act, and several of its provisions, is probably unconstitutional on its face as respects its regulation of religious organizations. The court has enumerated several of its concerns over what it feels may be its more flagant and serious constitutional impediments. However, this is not to demean plaintiffs' arguments as to its other constitutional claims, nor is it to say that plaintiffs must ultimately prevail on each and every challenge asserted.

It is not this court's function at this stage to set forth a detailed accounting of each and every offensive word or phrase in the statute. That task is preserved for a later time. Nor does the court reach the question of whether or not, if plaintiff Church is ultimately determined to be a non-religious entity, it may come within the scope of legitimate regulation of non-religious charitable organizations.

It is the court's view, nevertheless, that the core provisions of the 1978 amendments to the Act, those which seek to apply its terms to religious organizations, are unlikely to be found constitutional. For the time being, therefore, the plaintiffs should be permitted to continue their solicitations without threat of restraint or sanction imposed by the State under the Act.

Wherefore,

IT IS HEREBY RECOMMENDED that the defendants' motion to dismiss be in all things denied and that the plaintiffs' motion for a preliminary injunction be granted.

Dated: May 3, 1979.

ROBERT G. RENER
United States Magistrate

All objections must be filed with the Clerk of Court, Minneapolis, Minnesota, within 10 days of receipt of a copy of Report and Recommendation.

APPENDIX D

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1131
September Term, 1980

Pamela Valente, et al,

Appellees,

vs.

John R. Larson, etc., et al,

Appellants.

No. 80-1159
Pamela Valente, et al,

Appellants,

vs.

John R. Larson, etc., et al,

Appellees.

APPEALS FROM the United States District Court for the District of Minnesota.

THIS CAUSES came on to be heard on the original designated record of the United States District Court for the District of Minnesota and briefs of the respective parties and were argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in these causes be, and the same are hereby, vacated in accordance with the opinion of this Court.

And it is further ordered by this Court that these causes be, and they are hereby, remanded for entry of a modified injunction and further proceedings consistent with this opinion.

January 7, 1981

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 80-1131
No. 80-1159

Pamela Valente, Larry Barber, Larry Heft, Kimberly Korman, and Holy Spirit Association for the Unification of World Christianity,

Appellees/Cross-Appellants,

vs.

John R. Larson, Commissioner of Securities, Minnesota Department of Commerce; Warren Spannaus, Minnesota Attorney General; Individually and in Their Official Capacities,

Appellants/Cross-Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that John R. Larson and Warren Spannaus, the above named appellants/cross-appellees, hereby appeal to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Eighth Circuit filed and entered on January 7, 1981 vacating

and remanding the judgment of the United States District Court for the District of Minnesota filed on January 21, 1981.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

Dated: March 20, 1981.

STATE OF MINNESOTA
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Cross-Appellees

APPENDIX F

CHAPTER 309
SOCIAL AND CHARITABLE ORGANIZATIONS

309.50 Solicitation of charitable funds; definitions.
309.515 Exemptions.
309.52 Registration requirement.
309.53 Annual report.
309.531 Licensing of professional fund raisers; bond required.
309.532 Denial, suspension and revocation of licenses.
309.533 Investigations; proceedings.
309.534 Cease and desist orders; injunctions; receivers.
309.54 Public record.
309.55 Use of names.

309.555 Limitations on charitable expenditures.
309.556 Public disclosure requirements.
309.56 Service of process.
309.57 District court jurisdiction.
309.58 Violations; witnesses; testimony.
309.581 Violations; penalties.
309.582 Consultants.
309.59 Construction; powers of attorney general.
309.591 Rule making power.
309.60 Reciprocal agreements, other states.
309.61 Severability.
309.62 Uniform management of institutional funds act; definitions.
309.63 Appropriation of appreciation.
309.64 Rule of construction.
309.65 Investment authority.
309.66 Delegation of investment management.
309.67 Standard of conduct.
309.68 Release of restrictions on use or investment.
309.69 Severability.
309.70 Uniformity of application and construction.
309.71 Citation.

NOTE: For definitions, see section 300.02.

309.50 SOLICITATION OF CHARITABLE FUNDS; DEFINITIONS.

Subdivision 1. As used in sections 309.50 to 309.61 the words, terms and phrases, defined in this section have the meanings given them.

Subd. 2. "Person" means any individual, organization, group, firm, copartnership, association, partnership, corporation, company, trust or joint stock association, church, religious sect, religious denomination, society, or league, and in-

cludes any trustee, receiver, assignee, agent or other similar representative thereof.

Subd. 3. "Charitable purpose" means any charitable, benevolent, philanthropic, patriotic, religious, social service, welfare, educational, eleemosynary, cultural, artistic, or public interest purpose, either actual or purported.

Subd. 4. "Charitable organization" means any person who engages in or purports to engage in solicitation for a charitable purpose and includes a chapter, branch, area office or similar affiliate or any person soliciting contributions within the state for a parent charitable organization, but does not include an organization whose primary purpose is supporting or opposing any candidate for elective office, or influencing the nomination for election or the election of any candidate for elective office.

Subd. 5. "Contribution" means the promise or grant of any money or property of any kind or value, including the promise to pay, or payment for merchandise or rights of any other description when representation is made by or on behalf of the seller or solicitor that the whole or any part of the price will be applied to a charitable purpose. "Contributions" shall not include any funds obtained by a charitable organization through grants from any governmental agency. "Contributions" shall include, in the case of a charitable organization offering goods and services to the public, the difference between the direct cost of the goods and services to the charitable organization and the price at which the charitable organization or any person acting on its behalf resells those goods or services to the public.

Subd. 6. "Professional fund raiser" means any person who for financial compensation or profit participates in public solicitation in this state of contributions for, or on behalf of

any charitable organization. A bona fide officer or employee of a charitable organization is not a professional fund raiser unless his salary or other compensation is computed on the basis of funds to be raised, or actually raised.

Subd. 6a. "Accounting year" means the 12 month period on which a charitable organization keeps its financial records.

Subd. 7 [Repealed, 1969 c 112 s 17]

Subd. 8. "Department" means the securities and real estate division of the department of commerce.

Subd. 9. "Parent organization" is that part of a charitable organization which coordinates, supervises or exercises control over policy, fund-raising, and expenditures, or assists or advises one or more chapters, branches or affiliates in the state.

Subd. 10. "Solicit" and "solicitation" mean the request directly or indirectly for any contribution, regardless of which party initiates communication, on the plea or representation that such contribution will or may be used for any charitable purpose, and include any of the following methods of securing contributions:

(1) Oral or written request;

(2) The distribtuion, circulation, mailing, posting, or publishing of any handbill, written advertisement, or publication;

(3) The making of any announcement to the press, over the radio, by television, by telephone, or telegraph concerning an appeal, assemblage, athletic or sports event, bazaar, benefit, campaign, contest, dance, drive, entertainment, exhibition, exposition, party, performance, picnic, sale, or social gathering, which the public is requested to patronize or to which the public is requested to make a contribution;

(4) The sale of, offer, or attempt to sell, any advertisement, advertising space, book, card, magazine, merchandise,

subscription, ticket of admission, or any other thing, or the use of the name of any charitable person in any offer or sale as an inducement or reason for purchasing any such item, or the making of any statement in connection with any such sale, that the whole or any part of the proceeds from any such sale will be used for any charitable purpose. A "solicitation" shall be deemed completed when made, whether or not the person making the same receives any contribution or makes any such sale.

Subd. 11. "Management and general costs" means costs determined to be management and general by generally accepted accounting principles.

Subd. 12. "Fund raising costs" means costs determined to be fund raising by generally accepted accounting principles.

309.515 EXEMPTIONS.

Subdivision 1. Subject to the provisions of subdivisions 2 and 3, sections 309.52 and 309.53 shall not apply to any of the following:

(a) Charitable organizations:

(1) which did not receive total contributions in excess of $10,000 from the public within or without this state during the accounting year last ended, and.

(2) which do not plan to receive total contributions in excess of such amount from the public within or without this state during any accounting year, and

(3) whose functions and activities, including fund raising, are performed wholly by persons who are unpaid for their services, and

(4) none of whose assets or income inure to the benefit of or are paid to any officer.

For purposes of this chapter, a charitable organization shall be deemed to receive in addition to such contributions as are

solicited from the public by it, such contributions as are solicited from the public by any other person and transferred to it. Any organization constituted for a charitable purpose receiving an allocation from a community chest, united fund or similar organization shall be deemed to have solicited that allocation from the public.

(b) A religious society or organization which received more than half of the contributions it received in the accounting year last ended (1) from persons who are members of the organization; or (2) from a parent organization or affiliated organization; or (3) from a combination of the sources listed in clauses (1) and (2). A religious society or organization which solicits from its religious affiliates who are qualified under this subdivision and who are represented in a body or convention is exempt from the requirements of sections 309.52 and 309.53. The term "member" shall not include those persons who are granted a membership upon making a contribution as a result of a solicitation.

(c) Any educational institution which is under the general supervision of the state board of education, the state university board, the state board for community colleges, or the university of Minnesota or any educational institution which is accredited by the university of Minnesota or the North Central association of colleges and secondary schools, or by any other national or regional accrediting association.

(d) A fraternal, patriotic, social, educational, alumni, professional, trade or learned society which limits solicitation of contributions to persons who have a right to vote as a member. The term "member" shall not include those persons who are granted a membership upon making a contribution as the result of a solicitation.

(e) A charitable organization soliciting contributions for any person specified by name at the time of the solicitation if all of the contributions received are transferred to the person named with no restrictions on his expenditure of it and with no deductions whatsoever.

(f) A private foundation, as defined in section 509(a) of the Internal Revenue Code of 1954, which did not solicit contributions from more than 100 persons during the accounting year last ended.

Subd. 2. Where any such group or association or person soliciting for the benefit of such group or association described in subdivision 1, clauses (a), (b) and (d), employs a professional fund raiser to solicit or assist in the solicitation of contributions, sections 309.52 and 309.53 shall apply and such group or association or person shall file a registration statement as provided in section 309.52 and an annual report as provided in section 309.53.

Subd. 3. The department may, by written order or regulation, suspend or wholly revoke the exempt status of any charitable organization or any group of charitable organizations exempted by this section or may require, prior to a solicitation by a charitable organization exempt by the provisions hereof, such information with respect thereto as the department may deem necessary to protect the public interest.

309.52 REGISTRATION REQUIREMENT.

Subdivision 1. No charitable organization, except as otherwise provided in section 309.515, shall solicit contributions from persons in this state by any means whatsoever unless, prior to any solicitation, there shall be on file with the department upon forms provided by the department, a registration statement containing, without limitation, the following information:

(a) Legally established name.

(b) Name or names under which it solicits contributions.

(c) Form of organization.

(d) Date and place of organization.

(e) Address of principal office in this state, or, if none, the name and address of the person having custody of books and records within this state.

(f) Names and addresses of officers, directors, trustees, and chief executive officer.

(g) Federal and state tax exempt status.

(h) Denial at any time by any governmental agency or court of the right to solicit contributions.

(i) Date on which accounting year of the charitable organization ends.

(j) General purposes for which organized.

(k) General purposes for which contributions to be solicited will be used.

(l) Methods by which solicitation will be made.

(m) Copies of contracts between charitable organization and professional fund raisers relating to financial compensation or profit to be derived by the professional fund raisers. Where any such contract is executed after filing of the registration statement, a copy thereof shall be filed within seven days of the date of execution.

(n) Board, group or individual having final discretion as to the distribution and use of contributions received.

(o) The amount of total contributions received during the accounting year last ended.

(p) Such other information as the department may by rule or order require to promote fairness of the solicitation and to assure full and fair disclosure of all material information to the department.

Subd. 1a. A charitable organization whose total contributions received during any accounting year are in excess of $10,000 shall file a registration statement with the department within 30 days after the date on which the organization's total contributions exceeded $10,000. The registration shall exist unless revoked by a court of competent jurisdiction, or the department, or as provided in subdivision 7. This subdivision shall not apply to a charitable organization which had filed a registration statement pursuant to this section for the accounting year last ended or to organizations described in section 309.515, subdivision 1.

Subd. 2. The first registration statement filed by a charitable organization shall include a financial statement of its operation for its most recent 12 months period immediately preceding the filing of the first registration statement.

Subd. 3. The registration statement shall be executed by any two duly constituted officers of the charitable organization who shall acknowledge that it was executed pursuant to resolution of the board of directors or trustees, or if there be no such board, then by its managing group which has approved the content of the registration statement, and shall certify that the board of directors or trustees, or if there be no such board, its managing group, have assumed, and will continue to assume responsibility for determining matters of policy and have supervised, and will continue to supervise the finances of the charitable organization.

Subd. 4. Where any chapter, branch, area office or similar affiliate of a charitable organization is supervised and controlled by a parent organization located within or outside the state, the affiliate may file a registration statement on behalf of the parent organization in addition to or as part of its own

registration statement, or the parent organization may file a registration statement on behalf of the affiliate in addition to or as part of its own registration statement.

Subd. 7. In no event shall the registration of a charitable organization continue in effect after the date such organization should have filed, but has failed to file an annual report in accordance with the requirements of section 309.53, and such organization, if in default under such section, shall not be eligible to file a new registration statement until it shall have filed the required annual report with the department.

309.53 ANNUAL REPORT.

Subdivision 1. Except as otherwise provided in subdivision 1a of this section, every charitable organization required to file a registration statement pursuant to section 309.52 shall file an annual report with the department of commerce upon forms provided by the department or on forms identical thereto on or before June 30 of each year if its books are kept on a calendar year basis, or within six months after the close of its fiscal year if its books are kept on a fiscal year basis. For cause shown the department may extend the time for filing the annual report for a period not to exceed three months.

Subd. 1a. A charitable organization may, but need not, file an annual report pursuant to this section if the organization:

(a) Did not receive total contributions in excess of $10,000 from the public within or without this state during the accounting year last ended.

(b) Does not plan to receive total contributions in excess of $10,000 from the public within or without this state during any accounting year, and

(c) Does not employ a professional fund raiser.

Subd. 2. Such annual report shall include a financial statement covering the immediately preceding 12 months period of operation, and shall be executed by any two duly constituted officers of the charitable organization, who shall acknowledge that it was executed pursuant to resolution of the board of directors or trustees, or if there be no such board, then by its managing group which has approved the content of the annual report.

Subd. 3. The financial statement shall include a balance sheet, statement of income and expense, and statement of functional expenses, shall be consistent with forms furnished by the department, and shall be prepared in accordance with generally accepted accounting principles so as to make a full disclosure of the following, including necessary allocations between each item and the basis of such allocations:

(a) Total receipts and total income from all sources;

(b) Cost of management and general;

(c) Cost of fund raising;

(d) Cost of public education;

(e) Funds or properties transferred out of state, with explanation as to recipient and purpose;

(f) Total net amount disbursed or dedicated within this state, broken down into total amounts disbursed or dedicated for each major purpose, charitable or otherwise;

(g) Names of professional fund raisers used during the accounting year and the financial compensation or profit resulting to each professional fund raiser. Unless otherwise required by this subdivision, the financial statement need not be certified.

A financial statement of a charitable organization which has solicited from the public within or outside this state total contributions in excess of $25,000 for the 12 months of opera-

tion covered by the statement shall be accompanied by an opinion signed by a certified public accountant that such statement fairly represents the financial operations of the charitable organization in sufficient detail to permit public evaluation of its operations. In giving such opinion the certified public accountant shall take into consideration capital, endowment or other reserve funds, if any, controlled by the charitable organization. The opinion need not conform to the wording of the opinion form of the annual report forms provided by the department.

Subd. 4. Where a registration statement has been filed by a parent organization or affiliate as provided in section 309.52, subdivision 4, the registered parent organization may file the annual report required under this section on behalf of the chapter, branch, area office, similar affiliate or person in addition to or as part of its own report or the registered affiliate may file the annual report required under this section on behalf of the parent organization in addition to or as part of its own report. The accounting information required under this section shall be set forth separately and not in consolidated form with respect to every chapter, branch, area office, similar affiliate or person within the state which raises or expends more than $10,000. The department of commerce may permit any chapter, branch, area office, similar affiliate or person to file a consolidated statement with any other chapter, branch, area office, similar affiliate or person or parent organization if the attorney general determines that the interests of the charitable beneficiaries will not be prejudiced thereby and that separate accounting information is not required for proper supervision.

309.531 LICENSING OF PROFESSIONAL FUND RAISERS; BOND REQUIRED.

Subdivision 1. No person shall act as a professional fund raiser unless licensed by the department. Applications for a license shall be in writing, under oath, in the form prescribed by the department and shall be accompanied by an application fee of $25. Each license shall be effective for a period of not more than 12 months from the date of issuance, and in any event shall expire on July 30 next following the date of issuance.

Subd. 2. The department shall have the power, in connection with any application for license as a professional fund raiser, to require the applicant to file a surety bond in such amount, not exceeding $20,000, and containing such terms and conditions as the department determines are necessary and appropriate for the protection of the public. The applicant may deposit cash in and with a depository acceptable to the department in such amount and in such a manner as may be prescribed and approved by the department in lieu of the bond.

Subd. 3. No professional fund raiser shall solicit in the name of or in behalf of any charitable organization unless such solicitor has written authorization from two officers of such organization, a copy of which shall be filed with the department. Such written authorization shall bear the signature of the solicitor and shall expressly state on its face the period for which it is valid, which shall not exceed one year from the date issued.

Subd. 4. The department may require that any licensed professional fund raiser submit financial reports, not more frequently than quarterly, in such form and containing such information as the department by rule or order requires.

309.532 DENIAL, SUSPENSION AND REVOCATION OF LICENSES.

Subdivision 1. The department may by order deny any application, suspend or revoke any license or registration, or may censure a licensee or registrant if it finds (1) that the order is in the public interest, and (2) that the applicant, registrant or licensee:

(a) has filed an application for a license or registration which is incomplete in any material respect or contains any statement which, in light of the circumstances under which it is made, is false or misleading with respect to any material fact;

(b) has engaged in a fraudulent, deceptive or dishonest practice;

(c) is permanently or temporarily enjoined by any court of competent jurisdiction from engaging in or continuing any conduct or practice involving any aspect of charitable solicitations; or

(d) has violated or failed to comply with any provision of this chapter or any rule or order under this chapter.

Subd. 2. The commissioner of securities and real estate of the department of commerce may promulgate rules and regulations further specifying and defining those actions and omissions which constitute fraudulent, deceptive or dishonest practices, and establishing standards of conduct for professional fund raisers.

Subd. 3. The department may issue an order requiring a licensee or registrant or applicant for a license or registration to show cause why the license or registration should not be revoked or suspended or the application denied. The order shall be calculated to give reasonable notice of the time and place for hearing thereon, and shall state the reasons for the

entry of the order. All hearings shall be conducted in accordance with the provisions of chapter 15. After the hearing, the department shall enter an order making such disposition of the matter as the facts require. If the licensee, registrant or applicant fails to appear at a hearing of which he has been duly notified, such person shall be deemed in default, and the proceeding may be determined against him upon consideration of the order to show cause, the allegations of which may be deemed to be true.

Subd. 4. The hearing may be conducted by a hearing examiner. The examiner shall make proposed findings of fact and submit them to the department. The department shall have the power to compel the attendance of witnesses, to examine them under oath, to require the production of books, papers and other evidence, and to issue subpoenas and cause the same to be served and executed in any part of the state.

Subd. 5. Orders of the department shall be subject to judicial review pursuant to chapter 15.

Subd. 6. The commissioner of securities and real estate of the department of commerce may promulgate rules of procedure concerning all hearings and other proceedings conducted pursuant to this chapter.

309.533 INVESTIGATIONS; PROCEEDINGS.

Subdivision 1. The commissioner in his discretion:

(a) may make public or private investigations within or outside the state as he deems necessary to determine whether any person has violated or is about to violate any provision of sections 309.50 to 309.61 or any rule or order thereunder, or to aid in the enforcement of sections 309.50 to 309.61 in the prescribing of rules and forms thereunder, and may publish

information, concerning the violation of sections 309.50 to 309.61 or any rule or order thereunder.

(b) may require or permit any person to file a statement in writing, under oath or otherwise as the commissioner determines, as to all facts and circumstances concerning the matter being investigated.

Subd. 2. For the purpose of any investigation or proceeding under sections 309.50 to 309.61, the commissioner or any person designated by him may administer oaths and affirmations, subpoena witnesses and compel their attendance, take evidence and require the production of any books, papers, correspondence, memoranda, agreements or other documents or records which the commissioner deems relevant or material to the inquiry.

Subd. 3. No person is excused from attending and testifying or from producing any document or record before the commissioner, in obedience to the subpoena of the commissioner or any person designated by him in any proceedings instituted by the commissioner, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, but no individual may be prosecuted or subjected to any penalty or forfeiture for an account of any transaction, matter or thing concerning which he is compelled, after claiming his privilege against self incrimination, to testify or produce evidence, except that the individual testifying is not exempt from prosecution and punishment for perjury or contempt committed in testifying.

Subd. 4. In case of contumacy by, or refusal to obey a subpoena to, any person, the district court, upon application by the commissioner, may issue to the person an order directing him to appear before the commissioner or the officer designated by him, there to produce documentary evidence if so

ordered or to give evidence touching the matter under investigation or in question. Failure to obey the order of the court may be punished by the court as a contempt of court.

309.534 CEASE AND DESIST ORDERS; INJUNCTIONS; RECEIVERS.

Subdivision 1. Whenever it appears to the commissioner that any person has engaged or is about to engage in any act or practice constituting a violation of this chapter or any rule or order hereunder:

(a) He shall have the power to issue and cause to be served upon the person an order requiring him to cease and desist from violations of sections 309.50 to 309.61. The order shall be calculated to give reasonable notice of the rights of the person to request a hearing thereon and shall state the reason for the entry of the order. A hearing shall be held not later than seven days after the request for the hearing is received by the commissioner after which and within 20 days of the date of the hearing the commissioner shall issue a further order vacating the cease and desist order or making it permanent as the facts require. All hearings shall be conducted in accordance with the provisions of chapter 15. If the person to whom a cease and desist order is issued fails to appear at the hearing after being duly notified, the person shall be deemed in default, and the proceeding may be determined against him upon consideration of the cease and desist order, the allegations of which may be deemed to be true. The commissioner may adopt rules of procedure concerning all proceedings conducted pursuant to this subdivision.

(b) He may bring an action in the district court in the appropriate county to enjoin the acts or practices and to enforce compliance with sections 309.50 to 309.61 or any rule

or order thereunder and he may refer the matter to the attorney general. This section shall in no way alter the authority of the attorney general to prosecute violations as set forth in sections 309.57 and 309.59. Upon a proper showing, a permanent or temporary injunction, restraining order or writ of mandamus shall be granted and a receiver may be appointed for the defendant or the defendant's assets. The court may not require the commissioner to post a bond.

Subd. 2. In any proceeding under the provisions of sections 309.50 to 309.61 in relation to injunction or receivership, the same may be brought on for hearing and disposition upon an order to show cause returnable upon not more than eight days notice to the defendant therein. The cases shall have precedence over other cases upon the court calendar, and shall not be continued without the consent of the state, except upon good cause shown to the court, and then only for the reasonable length of time necessary in the opinion of the court to protect the rights of the defendant party.

309.54 PUBLIC RECORD.

Subdivision 1. Registration statements, annual reports, and other documents required to be filed shall become public records in the office of the department.

Subd. 2. Every person subject to sections 309.50 to 309.61 shall maintain accurate and detailed books and records to provide the information required by sections 309.50 to 309.61. All such books and records shall be open to inspection at all reasonable times by the department or by the attorney general.

Subd. 3. Every charitable organization which is required to file an annual report under section 309.53 shall keep and maintain within Minnesota, at the place designated in its registration statement, the original books and records, or true copies thereof, pertaining to all money or other property col-

lected from residents of this state and to the disbursement of such money or property. Such books and records shall be preserved for a period of not less than 10 years from the date of preparation thereof.

309.55 USE OF NAMES.

Subdivision 1. No charitable organization or person acting for a charitable organization shall use the name of any other person (except that of an officer, director or trustee of the charitable organization by or for which contributions are being solicited) in public solicitation literature without the written consent of such other person. Nothing herein contained shall prevent the publication of names of contributors, without their written consent, in an annual or other periodic report issued by a charitable organization for the purpose of reporting to its membership. Nothing in sections 309.52 or 309.53 shall require the disclosure in any registration statement or annual report of the names of individual contributors and the amount contributed by each one individually.

Subd. 2. No charitable organization soliciting contributions shall use a name, symbol or statement so closely related or similar to that used by another charitable organization or governmental agency that the use thereof would tend to confuse or mislead the public.

Subd. 3. Registration under sections 309.50 to 309.61 shall not be deemed to constitute an endorsement by the state of Minnesota of the charitable organizations so registered, and no person shall directly or indirectly misrepresent the registration hereunder to any donor or prospective donor.

Subd. 4. No charitable organization and no person acting on behalf of a charitable organization shall use any uniformed personnel of any local, state or federal agency or department

to solicit contributions. This subdivision shall not apply to firefighters who solicit contributions in uniform.

Subd. 5. No charitable organization and no person acting on behalf of a charitable organization shall use or employ any fraud, false pretense, false promise, misrepresentation, misleading statement, misleading name, mark or identification, or deceptive practice, method or device, with the intent that others should rely thereon in connection with any charitable solicitation, including any such actions or omissions designed to confuse or mislead a person to believe that such organization is another organization having the same or like purposes; or to believe that the funds being solicited are or will be used for purposes and programs conducted within or for persons located within the state of Minnesota when such is not the case; or to otherwise present purposes and uses of the funds which are not as provided within the purposes and uses filed upon registration of said organization under this chapter, or if no such registration has been filed, then as provided under the exemption of said organization from federal and state income taxes as an organization formed and operating for charitable purposes as defined herein.

Subd. 6. No person shall, either in his own right or as agent, officer or employee of a charitable organization sell or otherwise furnish for a consideration to any other person any list of contributors.

Subd. 7. No moneys solicited within the state by any organization subject to this chapter shall be paid or contributed by the soliciting organization to any other charitable organization not registered under this chapter by which it is controlled or with which it is affiliated by contract, franchise or otherwise, whose purposes, policies, articles or bylaws are in conflict with those of the soliciting organization upon any

material matter unless such other organization to which such moneys are to be paid or delivered shall agree to be bound by the purposes, policies, articles and bylaws of the soliciting organization.

309.555 LIMITATIONS ON CHARITABLE EXPENDITURES.

Subdivision 1a. Any charitable organization which is required to register pursuant to section 309.52 and which expends or agrees to expend an unreasonable amount for management and general costs and fund raising costs shall not be eligible to maintain registration with the department. An amount expended or agreed to be expended by a charitable organization for management and general costs and fund raising costs in excess of 30 percent of total income and revenue is presumed to be an unreasonable amount. An amount expended or agreed to be expended by a charitable organization for management and general costs and fund raising costs of 30 percent or less of total income and revenue may be challenged as unreasonable by the department or the attorney general. Any expenditures made in violation of this provision shall be recoverable from the charitable organization by the attorney general.

Subd. 1b. Any professional fund raiser who receives or agrees to receive an unreasonable amount for management and general costs and fund raising costs shall not be eligible to maintain a license with the department. An amount received or agreed to be received by a professional fund raiser for management and general costs and fund raising costs in excess of 30 percent of the total contributions raised or received by reason of any solicitation activities is an unreasonable amount. An amount received or agreed to be received by a professional

fund raiser for management and general costs and fund raising costs of 30 percent or less of the total contribution raised or received by reason of any solicitation activities may be challenged as unreasonable by the department or the attorney general. Any expenditures made in violation of this provision shall be recoverable by the attorney general from the charitable organization or professional fund raiser or both.

Subd. 2. In the event that goods or services are provided to the public in connection with charitable solicitation, no charitable organization or professional fund raiser shall expend or agree to expend an unreasonable amount for management and general costs and fund raising costs, which is presumed to be an amount in excess of 30 percent of the difference between the cost to the charitable organization of all goods and services sold and the amount for which said goods and services are sold.

Subd. 3. Expenditures made or agreed to be made for management and general costs or fund raising costs shall include payments made or agreed to be made to professional fund raisers as compensation for services or reimbursement for expenses, or both. A charitable organization shall be deemed to have expended or agreed to expend any portion of contributions retained by the professional fund raiser pursuant to a contract with the charitable organization. Expenditures made or agreed to be made for management and general costs or fund raising costs shall also include payments made or agreed to be made to employees of the charitable organization and other persons.

Subd. 4. No person shall use the name of a charitable organization for financial compensation or profit unless the charitable organization has consented to the use of its name in a contract with the person. The contract shall:

(a) be in writing, and a copy thereof shall be filed with the department within seven days of the date of execution;

(b) disclose the amount of financial compensation or profit to be retained by the person;

(c) disclose the percentage of the total gross amount of moneys, funds, pledges or other property raised or received or to be raised or received in connection with the use of the name of the charitable organization which will be given to the charitable organization.

Subd. 5. In an action brought by the department or the attorney general pursuant to sections 309.532 or 309.57, a charitable organization may interpose as a defense to a violation of this section that fund raising costs and management and general costs in excess of 30 percent are reasonable because of extenuating or mitigating circumstances.

309.556 PUBLIC DISCLOSURE REQUIREMENTS.

In connection with any charitable solicitation, the following information shall be clearly disclosed:

(a) The name, address and telephone number of each charitable organization on behalf of which the solicitation is made;

(b) The percentage of the contribution which may be deducted as a charitable contribution under both federal and state income tax laws.

If the solicitation is made by direct contact, the required information shall be disclosed prominently on a card which shall be exhibited to the person solicited. If the solicitation is made by radio, television, letter, telephone or any other means not involving direct personal contact, the required information shall be clearly disclosed in the solicitation.

309.56 SERVICE OF PROCESS.

Subdivision 1. Any charitable organization or professional fund raiser which solicits contributions in this state, but does not maintain an office within the state shall be subject to service of process, as follows:

(a) By service thereof on its registered agent within the state, or if there be no such registered agent, then upon the person who has been designated in the registration statement as having custody of books and records within this state; where service is effected upon the person so designated in the registration statement a copy of the process shall, in addition, be mailed to the charitable organization or professional fund raiser at its last known address;

(b) When a charitable organization or professional fund raiser has solicited contributions in this state, but maintains no office within the state, has no registered agent within the state, and no designated person having custody of its books and records within the state, or when a registered agent or person having custody of its books and records within the state cannot be found as shown by the return of the sheriff of the county in which such registered agent or person having custody of books and records has been represented by the charitable organization or professional fund raiser as maintaining an office, service may be made by leaving a copy of the process in the office of the commissioner. Service upon the commissioner is not effective unless (a) the plaintiff, who may be the commissioner in a suit, action, or proceeding instituted by him, forthwith sends notice of the service and a copy of the process by certified mail to the defendant or respondent at his last known address or takes other steps which are reasonably calculated to give actual notice, and (b) the plaintiff's

affidavit of compliance with this subdivision is filed in the case on or before the return day of the process, if any, or within a further time the court allows.

Subd. 2. The solicitation of any contribution within this state shall be deemed to be the agreement of the charitable organization or professional fund raiser that any process against it which is so served in accordance with the provisions of this section shall be of the same legal force and effect as if served personally within this state.

309.57 DISTRICT COURT JURISDICTION.

Upon the application of the attorney general the district court is vested with jurisdiction to restrain and enjoin violations of sections 309.50 to 309.61.

309.58 VIOLATIONS; WITNESSES; TESTIMONY.

Whenever the department or the attorney general has reason to believe that a violation of sections 309.50 to 309.61 has been committed or may be committed by a charitable organization or professional fund raiser, or its officers, directors, trustees, agents or servants, either the department or the attorney general may request information relevant to the provisions of sections 309.50 to 309.61 from such charitable organization or professional fund raiser. If, in the opinion of the department or the attorney general, such charitable organization or professional fund raiser, through its managing group, fails to furnish the information requested, or fails to satisfy the department or the attorney general that the charitable organization or professional fund raiser or its officers, directors, trustees, agents or servant do not have or cannot acquire the information requested, the registration statement of such charitable organization or the license of the professional fund

raiser may be suspended, revoked or censured by the department in accordance with the provisions of section 309.532.

309.581 VIOLATIONS; PENALTIES.

Any person who wilfully and knowingly violates any provision of sections 309.50 to 309.61, or who wilfully and knowingly gives false information to the department or attorney general in statements, reports or contracts required to be filed with the department by sections 309.50 to 309.61 shall be guilty of a misdemeanor.

309.582 CONSULTANTS.

The attorney general may retain as consultants such accountants or other experts as the administration of this chapter may require.

309.583 [Repealed, 1976 c 2 s 124]

309.59 CONSTRUCTION; POWERS OF ATTORNEY GENERAL.

Sections 309.50 to 309.61 shall not be construed to limit or to restrict the exercise of the powers or the performance of the duties of the attorney general which he otherwise is authorized to exercise or perform under any other provision of law.

309.591 RULE MAKING POWER.

The commissioner of securities and real estate of the department of commerce may promulgate such rules as are reasonably necessary to carry out and make effective the provisions and purposes of this chapter.

309.60 RECIPROCAL AGREEMENTS, OTHER STATES.

The department may enter into reciprocal agreements with a like authority of any other state or states for the purpose of exchanging information made available to the department or to such other like authority.

309.61 SEVERABILITY.

If any provision of sections 309.50 to 309.61 or the application thereof to any person or circumstance is held invalid the invalidity shall not affect other provisions or application of said sections which can be given effect without the invalid provision or application, and to this end the provisions of said sections are severable.